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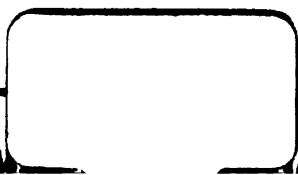
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PENNSYLVANIA
STATE REPORTS.

VOL CXXXVI.

CONTAINING
CASES ADJUDGED
IN THE
Supreme Court of Pennsylvania.

BY
BOYD CRUMRINE,
STATE REPORTER.

VOL. XXI.

CONTAINING
CASES DECIDED AT MAY AND OCTOBER TERMS, 1890.

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for the State of Pennsylvania.
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JUSTICES
OF THE
SUPREME COURT OF PENNSYLVANIA
DURING THE PERIOD OF THESE REPORTS.

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Justice,	.	.	.	.	HENRY GREEN.
Justice,	.	.	.	.	SILAS M. CLARK.
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Justice,	.	.	.	.	J. BREWSTER MCCOLLUM.
Justice,	.	.	.	.	JAMES T. MITCHELL.

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MR. WILLIAM S. KIRKPATRICK.

JUDGES OF THE COURTS BELOW

DURING THE PERIOD OF THESE REPORTS.

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No. 2: J. I. CLARK HARE, P. J.; D. NEWLIN FELL and SAMUEL W. PENNYPACKER, JJ.

No. 3: THOMAS K. FINLETTER, P. J.; JAMES GAY GORDON and HENRY REED, JJ.

No. 4: M. RUSSELL THAYER, P. J.; MICHAEL ARNOLD and ROBERT N. WILLSON, JJ.

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3d—Northampton County.

W. W. SCHUYLER, P. J.; HOWARD J. REEDER, J.

4th—Tioga County.

JOHN I. MITCHELL, P. J.

5th—Allegheny County.

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LUCIEN W. DOTY, P. J.

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CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—PHILADELPHIA, 1890.

PHILIP KELLER v. MARY P. OVER ET AL.

APPEAL BY PLAINTIFF FROM THE COURT OF COMMON PLEAS
OF CENTRE COUNTY.

Argued April 25, 1889—Decided June 4, 1890.

[To be reported.]

1. Where both parties in ejectment claim by lines and corners marked on the ground, the rule that an official survey duly made and returned, and unquestioned for more than twenty-one years, is conclusively presumed to have been actually made upon the ground as returned, is inapplicable.
 2. Such presumption, being raised only to supply the place of actual proofs, has no application to a case in which the existence of marks upon the ground, establishing where the official survey was actually made, is shown; in which case, the proper location of the tract is to be determined by the jury from such marks: *Grier v. Penna. Coal Co.*, 128 Pa. 79.
 3. Where there are no marks upon the ground exhibiting the actual location of one of the lines of an official survey duly returned, that line may be fixed by protraction from any known monument on any other known line, by means of the legal presumption that the lines were run upon the ground as returned.
 4. And when different marked lines are found on the ground, the fact that the official return of survey corresponds with a marked line contended for by one of the parties, is a circumstance proper for the con-
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Statement of Facts.

sideration of the jury in determining which of the lines is the true location.

5. But, upon the trial of such case, a charge which, while conceding that the marks upon the ground must control in deciding the question of location, directs the jury to apply, in their consideration of the evidence, the presumption that the official survey, being more than twenty-one years old, was made as returned, is misleading.

Before PAXSON, C. J., CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 399 January Term 1889, Sup. Ct.; court below, No. 121 November Term 1883, C. P.

On October 18, 1883, Philip Keller brought ejectment against George W. Ford and James A. Beaver for a tract of land containing 300 acres and six per cent allowance, etc. The defendant's plea was not guilty. On February 1, 1886, the death of George W. Ford being suggested, Mary P. Over and others, his heirs at law, were substituted as defendants.

At the trial on December 7, 1887, the following facts were shown :

The land claimed by the plaintiff was embraced in an official survey, made August 5, 1874, in pursuance of a warrant dated June 3, 1869, granted to Joseph Devling. By a regular chain of title the claim of Joseph Devling, under said warrant and survey, was vested in the plaintiff. The heirs of George W. Ford showed title in themselves to a tract originally surveyed under a warrant dated April 29, 1793, in the name of Thomas Greeves; and James A. Beaver showed title to a tract surveyed under a warrant of the same date, in the name of Samuel M. Fox. Ford's heirs were in possession of a part of the land sued for in this action, claiming that the same was embraced within the Greeves survey, and Beaver was in possession of the remainder of it, and claimed the same as a part of the Fox survey. The only controversy in the case was over the proper location of the Greeves and Fox surveys. If that location was as the plaintiff claimed it to be, his title was good; but if the proper location was as claimed by the defendants, they had the older and superior title to the land in dispute.

The Greeves and Fox surveys were part of a block of surveys known as the Moore Wharton block. That block was

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located and surveyed, under the warrants which covered it, in August, 1794. The testimony for the defendants tended to show that the western boundary line of the Moore Wharton block, as run and marked upon the ground by the official surveyor, coincided with the eastern line of another block, known as the Slaymaker block; while the testimony for the plaintiff tended to show that the western boundary of the Moore Wharton block was located and marked upon the ground by the surveyor some distance to the east of the Slaymaker block, leaving, between the two, the strip of land afterwards covered by the Devling survey.

At the close of the testimony the court, SIMONTON, P. J., 12th district, specially presiding, charged the jury in part as follows :

The matter in controversy is whether the land surveyed on the Joseph Devling warrant is the same land which was covered by the Thomas Greeves and Samuel M. Fox surveys.

The title held by the defendants is the older title; therefore, if the land claimed by the plaintiff was covered by surveys and patents issued at an earlier date, which the defendants now own, then your verdict would have to be for the defendants; whereas, if the surveys made upon defendants' warrants do not cover the land where the plaintiff's survey was located, then your verdict would be for the plaintiff.

You understand then, gentlemen of the jury, it is a question of location and not a question of paper title; a question of location; and that question you have to determine. It is a question of fact for the jury; it is your duty, therefore, to determine it, not the duty of the court. Our duty is to instruct you on the principles of the law which must guide you in determining that question. . . .

In 1794, at the time the warrants were granted under which the defendants in this case claim, the law was that no person should take a warrant for more than 400 acres, on which, however, they were allowed to have surveyed and returned a small amount in excess over that number of acres. But it became a settled practice for persons wishing to appropriate more land than that, to make a number of applications at the same time for warrants in the names of different persons, either actual

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persons, who allowed their names to be used for the purpose, or fictitious persons; and this practice was winked at by the land authorities, who knew the fact that the warrants were really taken in the various names by a single person or company of persons, whose title was fixed by accepting payments of the purchase money from them. When a number of warrants were thus taken out, and surveys were made upon them, they were considered, in fact and reality, as a single survey, and they have been called ever since a block or batch of surveys; and the rule was adopted and settled that they should be surveyed as a single tract. It was equivalent, in fact, to a person taking out a warrant and having a survey made for a large tract containing the number of acres which all the surveys amounted to when added together.

Counsel have asked us to give you certain instructions as to the rules and principles according to which batches or blocks of warrants were to be surveyed, and according to which the location is to be located and determined. We will give you these instructions at this point.

The plaintiff has asked us to say to you :

1. That the lines run and marked upon the ground by the deputy surveyor and returned by him, constitute the actual survey; and, when they can be found and identified, they are the highest and best evidence of where the survey is located."

Answer: This is affirmed.

2. The calls for natural and visible monuments, such as streams, waters, etc., are the next best evidence of the location of a tract or block of surveys, when its own lines cannot be found.

Answer: This point is affirmed with this one qualification, that this is so where the jury find that the streams, waters, etc., are laid down from actual survey and actual observation of the surveyor. We insert this qualification, in answering the above point, because of a fact well known, a fact referred to here by counsel on both sides, that surveyors did not run all the lines of their surveys. It is well known that they frequently marked waters upon surveys, when they had not actually run the lines; and of course where they did that, not as much confidence would be put in the accuracy of their marking of the waters; and where it appears to the jury, in any given case, that the waters were marked without an actual survey having been made, of

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course it would have very little weight, but the situation of the waters, when they were laid down by the surveyor, having been actually upon the ground, is of weight as stated in this point.

4. That in the absence of lines run and marked, or adopted, for the tract or block, and in the absence of natural visible monuments called for, calls for adjoining surveys are the next best evidence of the location of the tract.

Answer: This is affirmed.

5. Courses and distances are the weakest evidence of the location of a tract or block of surveys, and can only be resorted to when all superior evidence fails.

Answer: This is also affirmed.

6. When lands are surveyed and returned into the land office in blocks, they are to be located in blocks.

Answer: This is affirmed.

7. The location of one or two particular tracts of a block cannot be arbitrarily determined, but it is to be got at by first locating the block of which they are parts.

Answer: This is also affirmed.

8. The lines and corners of each tract of a block of surveys belong to every other tract of the block, and assist in locating every tract.

Answer: Affirmed.

The defendants have asked us to say virtually the same:

1. That in locating a block of surveys, all the lines and corners marked upon the ground must be taken into account; those found upon any part of the block belong to each and every tract of which it is composed, and if sufficient, determine the location of the entire block.

Answer: This is affirmed.

2. A block of surveys must be so located as to preserve as far as possible the entire conformation of the block as officially returned.

Answer: This is affirmed. It is a matter to be looked to; it does not control absolutely, but where they can be so located, and between such a location and another that would distort the general conformation of the block, the location that would preserve its contour would have the preference.

[There are two other rules with respect to which instructions have not been asked for by either side, but they are rules to be

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observed by the jury in considering the question of location, and these are: That where surveys have been made and returned into the land office for a period greater than twenty-one years, without having ever been questioned or controverted, the presumption is conclusive that the surveyor actually made the survey upon the ground. It is also a rule that where surveys have been made and returned for over twenty-one years, without dispute, the presumption is that they were actually made as they were returned, or located; where they are returned as having been located; and, after the lapse of so long a period, as in this case, if you find that these surveys returned in 1794 were not questioned until 1869, after the lapse of so long a period as that the presumption would be very strong that originally the surveys were made as they were returned as having been made and located. The reason of this is, that after so long a period of time the marks made by the surveyor disappear, the witnesses die, trees die, are burned or cut down, and posts decay. The greater the lapse of time, the more difficult it is to follow the work of the surveyor on the ground; and hence it is necessary to pay great regard to the report the surveyor made of his work, that is, to his official return of survey. It is a fair presumption that his return is correct and truthful.] ¹

[Bearing in mind, gentlemen of the jury, these rules as we have stated them, you must endeavor to ascertain in the first place where the official returns say that the surveyor located these thirty surveys of the Moore Wharton block.] ² For you understand there is no dispute as to the location of the Devling survey, there is no doubt as to where that was located; that is not the question; the question is, were the Samuel M. Fox and Thomas Greeves located where the Devling is located. In order to ascertain this you must look for the location of the Moore Wharton block, of which the Fox and the Greeves form a part.

[We say to you, in the first place, it is proper for you to look and see where the surveyor in 1794 returns he had located them. (The court here recited the locations of the surveys of the Moore Wharton block, on its west line, from the official return.) That is the way in which the deputy surveyor returns that he located these tracts. As we have said, after so long a lapse of time the presumption would be that this is the way he

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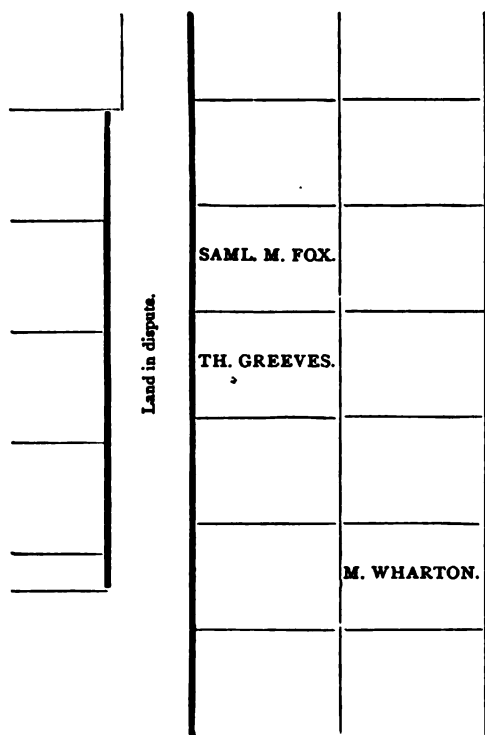
did locate them. After the lapse of so many years, sixty or seventy the courts say, there would be a presumption, a strong presumption, a strong probability that he did locate them in that way.]³ But this would be a probability which would be overcome by evidence of the work on the ground, if his work on the ground was different. Then, if you ascertain that work and are satisfied of the correctness of your finding of that work, that would control.

[The defendants then start out with this presumptive location by the deputy surveyor. You have heard the evidence they have produced to sustain their claim that this location is substantiated by the work upon the ground.]⁴ [They have shown you a connected draft of the Slaymaker block, lying directly west, as they claim, of the Moore Wharton block; they have shown that according to this draft before you, there are these jogs in the surveys, just as they are called for here, and that one would fit the other. They have given evidence tending to show that the calls for the corners on the western line of these Moore Wharton tracts are the same as the calls on the corresponding eastern tracts in the Slaymaker block, and you have heard also the evidence of the surveyors as to the running of the line, which is, I believe, admitted on both sides to be the eastern line of the Slaymaker block. The defendants claim that this is also a line of the Moore Wharton block, and that the two blocks come together. You have learned, also, from the testimony, that the Slaymaker surveys call for the Moore Wharton surveys, while the Moore Wharton surveys on that side call for vacant land. And, I believe, it has been shown that the Moore Wharton tracts are the younger, so that you have the older surveys calling for the younger, while the younger call for vacant land on the side where the older are located. The difference in the date is not very great, not more than something like a week between the time that some of these tracts are returned as being located on the one side and on the other. The defendants claim that the surveys were all in the hands of one surveyor at the same time, and that the reason of the call for the vacant land by the surveys of the Moore Wharton block, may be that they were surveyed first, while in reality the Slaymaker were first returned. You will consider that and give it what weight it is entitled to. If that was the case it might explain the fact of the Moore Wharton

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tracts calling for vacant land without forcing you to the conclusion that there was a vacancy between the two blocks.]⁵

You understand that the plaintiff claims that this call is correct, that there is a vacancy; that while, when the Slaymaker warrants were located, the surveyor may have intended to join the Moore Wharton surveys to the Slaymaker, yet, plaintiff claims he did not do so in fact, and therefore called for vacant land there. [It is very probable that the call for that vacant land originated all this controversy. It is very probable that if there had been no call there for vacant land, the idea would not have arisen that the vacancy existed;]⁶ but the call is there; it is one of the facts of the case, and must be considered, together with all the other evidence in the case, in determining what is the true location. . . .



PLAINTIFF'S MAP.*

* And see, also, Holt's App., 98 Pa. 26.

Charge of Court below.

The plaintiff has shown his claim by the map, which he exhibits and which you now see before you. You see according to his claim of location there would be a vacancy where the Joseph Devling tract is located on his map. He says that this vacancy is shown by the work upon the ground, and his map exhibits what he claims to be that work. . . .

We have not called your attention to all of the evidence on either side. You have heard it all and it has been discussed at length by the counsel in your hearing. [We leave it to you to remember what the evidence is, and to apply it to the case according to the principles we have laid down, remembering that the strongest evidence is the work on the ground; remembering, also, that after so great a lapse of time it may be difficult to find the work upon the ground, and that because of this, greater weight with the lapse of time is to be given to the returns made by the surveyor, and if the location indicated by these returns is different from and discredited by the work upon the ground, you would take that as being correct. But if you do find that the work upon the ground does not agree with the returns, then you take the work upon the ground, because that is the survey itself, if you can find what the surveyor did, that is, the surveys; and what he did at that time, in 1794, must remain and stand as the fact of the case.] *

[If the theory of the plaintiff as laid down on that map is correct, then, as you have heard and see, the surveyor must have laid down three tracts where there was no room for them at all, the Thomas P. Wharton, David Lewis and Richard Waln. The corners of these tracts are designated by posts. It is well known that where surveyors did not actually do their work upon the ground, they did not mark the corners, but referred to them as posts even if the work was in the woods. If the surveyor did not plot or lay these surveys down as you see them represented on paper, while the ground was already occupied by surveys laid down north and south of them; if he plotted them on paper where there was no room for them, they must of course give way. But you must consider carefully whether he made such mistake. After this lapse of time, in the face of these returns, you are to consider carefully whether he did make an error in his work in that way. You are not to fail to give weight to it if the work was actually done in

Arguments.

that way, but we caution you not to come to a hasty conclusion as to whether the work was so done.]⁹

The verdict of the jury was in favor of the defendants. Motions in arrest of judgment and for a new trial having been refused, judgment was entered on the verdict, when the plaintiff took this appeal, assigning for error:

1-9. The parts of the charge embraced in []^{1 to 9}

Mr. J. H. Orvis (with him *Mr. W. C. Kress, Mr. C. M. Bower and Mr. E. L. Orvis*), for the appellant:

1. We do not allege that all the parts of the charge assigned for error are misstatements of the law, but we contend that the tendency of the charge as a whole, was misleading, and that its natural and inevitable result was to carry the minds of the jury to a wrong conclusion. The first of the rules which the court, after answering the points of the parties, voluntarily laid down, is a correct statement of that declared in *Ormsby v. Ihmsen*, 34 Pa. 462; but there was no room for the application of it in this case, as neither party contended that the survey of the Moore Wharton block was a chamber survey and never actually made on the ground. Both parties contended for an actual location by lines and corners, and the court might just as well have quoted to the jury any other rule or maxim of law or equity.

2. It was not claimed by either party, however, that each line of every tract in the block had been actually run. This was seldom if ever done in the location of such blocks, and the fact that certain interior lines were not so run, would not have prevented the survey from being an actual and a valid one, even before the adoption of the rule in *Ormsby v. Ihmsen*. If, however, the court below meant that there was a conclusive presumption of the actual running and marking of each line of every tract in the block, this would be carrying that rule further than any decision of this court authorizes. The second rule laid down by the court is neither a clear nor an accurate statement of the rule applicable to the location of surveys. While a presumption exists that the lines, the corners, the distances and the quantity of land are as the return of the deputy surveyor shows them to be, this presumption is not strong and may be

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rebutted by proof that the lines run and marked by him differ, in both courses and distances, from those returned to the land office.

3. This court has always recognized the following rules: (a) The lines run and marked upon the ground constitute the actual survey, and when they can be found and identified establish the survey against all other kinds of evidence. (b) Calls for natural monuments are the second best evidence of the location of surveys, and must prevail in the absence of lines actually marked on the ground. (c) Calls for adjoining surveys are the third best evidence of the location of a survey, or block of surveys, and, in the absence of lines marked and natural monuments, furnish the next best evidence of location. (d) The courses and distances returned are the lowest and weakest evidence of the location, and are only to be resorted to in the absence of all other means of ascertaining it: *Wharton v. Garvin*, 34 Pa. 340; *Malone v. Sallada*, 48 Pa. 419; *Darrah v. Bryant*, 56 Pa. 69; *Pruner v. Brisbin*, 98 Pa. 202. These rules are as applicable to old surveys, as to young ones.

4. Want of distance on the ground for all the tracts returned in a block, is not so uncommon a thing as to be an argument against the validity of lines and corners actually found on the ground for the block. This identical thing is found in *Sugar V. Lumbering Co. v. Barber*, 87 Pa. 313. The natural effect of the strong caution given to the jury, not to convict the deputy surveyor of such an error, was to cause them to disregard the actual lines run and marked upon the ground, because they would not leave room for all the tracts returned, thus again making the return higher evidence than the work done on the ground. This court took a very different view of this point, in connection with the location of this same block of surveys, in *Holt's App.*, 98 Pa. 257.

5. After stating correctly the rules of law applicable to the questions of location, in answer to the points presented, the court proceeded in effect to destroy those rules and establish a contrary one, viz., that the return of survey, when it is very old, is to govern in all disputed questions of location, and that the jury must look with suspicion on all lines and marks upon the ground which differ in any degree from those returned. This idea permeates the whole latter part of the charge, and

Opinion of the Court.

destroys the effect of what the court had previously stated correctly. The natural tendency of the charge to impress upon the minds of the jury an erroneous rule for their guidance, is sufficient ground for reversal, even if no specific error could be pointed out: *Bisbing v. Bank*, 93 Pa. 79; *Fawcett v. Fawcett*, 95 Pa. 376; *Coxe v. Deringer*, 82 Pa. 236; *Linn v. Commonwealth*, 96 Pa. 285.

Mr. John G. Love (with him *Mr. J. W. Gephart*), for the appellees:

After twenty-one years from the return of a survey into the land office, there is a conclusive presumption of law that it was regularly made upon the ground as returned: *Collins v. Barclay*, 7 Pa. 67; *Bellas v. Cleaver*, 40 Pa. 260; *Packer v. Mining & M. Co.*, 97 Pa. 379; *Salmon Cr. L. & M. Co. v. Dusenbury*, 110 Pa. 446; *Lambourn v. Hartswick*, 13 S. & R. 113; *Norris v. Hamilton*, 7 W. 91; *Fugate v. Coxe*, 4 S. & R. 293. In charging the jury, the court did not lay down the rule of presumption as strongly as the cases cited. And the jury were not instructed that this rule was conclusive of the location in this case, nor even that the burden was on the plaintiff to show that the survey was not located as returned, but they were told that the work on the ground would overcome the presumption and control the location. Taken in their connection, the portions of the charge complained of were neither erroneous nor misleading. Full weight and prominence were given to the work found on the ground and the streams and natural monuments mentioned by the witnesses.

OPINION, MR. JUSTICE MCCOLLUM:

When the evidence in this case was closed, the plaintiff's right to recover depended on whether the land called for by his survey had been previously appropriated by the warrants under which the defendants claimed. His survey lay between two lines of the proper age for the defendants' surveys. If the eastern line was the defendants' west line, the plaintiff was entitled to a verdict. If the defendants were right in holding to the western line, then the plaintiff had no land and no right to recover. This was a question of fact for the jury, to be determined on a consideration of all the evidence. The counsel

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representing the parties to the issue submitted written points, which embodied all the law on the subject of location applicable to the case. The learned judge correctly answered these points, but in his general charge went beyond them, and introduced an element to which we are indebted for the presence of the case in this court. He told the jury, in substance, that there were two other rules to be observed by them in considering the question of location, and with respect to which neither party had asked instructions: First, that there was a conclusive presumption that a survey duly returned, and not questioned for more than twenty-one years, was actually made by the surveyor upon the ground; and, second, that after the lapse of twenty-one years there was a presumption that a survey so returned was actually made as returned or located, and that the latter increased in strength and weight as the years pass by. It is sufficient to say of the first that it had no application to this case, because both parties claimed by lines and corners marked upon the ground. As to the second, if there had been no marks on the ground on the west side of the defendants' surveys, their west line could have been fixed by protraction from any known monument on any other line, by means of the legal presumption that the lines had been run as they were returned.

But there were marks on the ground on the west side of the defendants' surveys. In the presence of the marks on the ground, the line was to be located by the jury from them, and the doctrine of the legal presumption that the lines were run as returned had no place in the case. Presumptions are raised to supply the place of actual proofs; when the proofs are present, there is neither foundation nor room for the presumption: *Grier v. Penna. Coal Co.*, 128 Pa. 79. The official return of the survey was evidence in the cause, and its correspondence with the marked line to which the defendants claimed on the west was a circumstance to be considered by the jury, and to which it was proper for the court to direct their attention.

Aside from the introduction of the presumptions mentioned, and the use that was made of them in the charge, this case was well tried. But when the learned judge, whilst conceding that the marks upon the ground should govern in deciding the question of location, applied to it the presumption that the survey was made as returned, he did that which might, and naturally

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would, mislead a jury. In various forms in the general charge, and with marked emphasis, he kept prominently before them the presumption he had voluntarily invoked, to aid them in solving the problem of location; and he dwelt on the age of the surveys as lending strength to the presumption, and increasing the probability, that the official return was correct. The natural tendency of this was to draw their attention from the work on the ground to the official return, from the best to the weakest evidence, and to subordinate the former to the latter. As we think the charge was misleading in this respect, we are constrained to reverse the judgment.

Judgment reversed, and venire facias de novo awarded.

R. B. SHERIDAN v. FRANCIS SHERIDAN ET AL.

APPEAL BY PLAINTIFF FROM THE COURT OF COMMON PLEAS
NO. 1 OF PHILADELPHIA COUNTY.

Argued January 20, 1890—Decided June 4, 1890.

[To be reported.]

1. Under § 3, act of March 17, 1845, P. L. 160, and § 1, act of February 14, 1857, P. L. 39, the Courts of Common Pleas throughout the state have ample power to make partition by proceedings in equity, in all cases where the title of the plaintiff is clear.
 2. The reason why a testamentary direction to sell real estate works a constructive conversion, is that an actual conversion is thereby made certain; and the estate is treated as having at once the qualities which it must necessarily have when the power of sale is executed.
 3. Hence, when a will contains no positive direction to sell, but merely gives the executors a naked power of sale, to be used "if they find it necessary to do so in order to make a fair and equitable division" of the estate in accordance with the will, to work a conversion an actual sale is necessary.
- (a) By her will a testatrix divided her estate into four shares bequeathing and devising one share to each of her three children for life, with a limitation over of said three shares and a gift of the fourth share to her grandchildren, to come into their possession at majority, respectively, and until then to be held in trust:

136	14
160	71
136	14
178	424
136	14
e225	4359

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4. In such case, as each grandchild became of full age the trust terminated as to him, and he became seised of such an interest in the real estate of the testatrix as enabled him to maintain a bill for a partition, notwithstanding an unexercised naked power to sell for purposes of division.

Before PAXSON, C. J., STERRETT, GREEN, WILLIAMS, McCOLLUM and MITCHELL, JJ.

No. 137 July Term 1889, Sup. Ct.; court below, No. 669 December Term 1888, C. P. No. 1.

On December 31, 1888, Richard B. Sheridan filed a bill in equity against Francis Sheridan and others, praying for partition of a tract of land in the city of Philadelphia, containing about twenty-two acres.

The bill averred that Elizabeth G. Sheridan, deceased, died seised of said tract of land, leaving a will and codicil appointing Jacob L. Smith, Walter E. Rex and Joshua T. Owen as her executors; that, said Smith and Rex having renounced, letters testamentary were granted to said Owen as the sole acting executor, and that subsequently, said acting executor having died, the Orphans' Court of Philadelphia county appointed the Commonwealth Title Insurance & Trust Company to be trustee under said will in his place. The will, a copy of which was appended to the bill, provided, *inter alia*, as follows:

"Item. It is my wish and I hereby direct, that my son Robert shall have the privilege (if he so desires) of selecting as his share of my estate, or as a part of his share (as it may happen), that portion of the farm which belonged to him and which I bought at the sale of his property, subject however to the disposition and division of my property hereinafter made, and the share, interest and estate hereinafter given to each one of my children.

"Item. I direct that all my estate, real, personal and mixed (except as hereinbefore disposed of), and all the rest, residue and remainder thereof, of whatsoever kind and wheresoever situate, shall be divided into four equal shares or portions; and I give, devise and bequeath unto each of my three children now living one of said equal shares or portions for and during the term of his or her natural life. The fourth or remaining portion of my said estate I order and direct to be divided into as many shares as there are grandchildren living at the time of

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my death ; and I give, devise and bequeath one of said shares to Richard, child of my deceased son, Owen, absolutely when he shall attain his majority, and to be held by my executors in trust for him during his minority. The remaining shares or subdivisions of the above-mentioned fourth part of my estate I give, devise and bequeath to my other grandchildren living at the time of my death, each one share, and to be held in trust for them by my executors during their minority.

“Further, I order and direct that upon the death of each of my said three children now living, when and as the same may occur, the share of my estate above devised to each of them, shall be divided into as many shares or portions as there are grandchildren of mine then living, and I give, devise, and bequeath one of said shares to each grandchild to take effect in possession and enjoyment upon the arrival of each at the age of twenty-one years ; said shares to be held in the meantime by my executors in trust for said grandchildren.

“In the event of the death of any one of my said three children before my own death, I direct that his or her said share as above devised shall be divided in the same manner as the above-mentioned fourth share is to be divided at the time of my death.

“The object and intention of the above disposition of my property is to give each of my said grandchildren an equal share and portion in my estate, to take effect in possession and enjoyment when the life-estate of each of my said children shall terminate (subject to the said grandchildren being of age as above provided) and not to postpone such enjoyment until all my said children have died.

“Item. I order and direct that each of my said children shall during their respective life-estates have full power and authority to receive and take all rents, issues, and profits accruing from their respective shares, but they shall not in any manner encumber their said shares by any mortgage or judgment without authority first obtained from the court through my executors.

“Item. I hereby authorize and empower my executors, hereinafter named, to sell and dispose of the whole or any portion of my real and personal property at public or private sale, if they find it necessary to do so in order to make a fair and

Statement of Facts.

equitable division of my estate; and I hereby give them full power and authority to make, execute, and deliver to the purchasers thereof all deeds and assurances which are necessary, and without any liability on the part of the said purchasers for the application of the purchase-money. And I further direct my executors to invest the money realized by any such sale in good and legal securities, which are to be held by them in trust for the uses and purposes hereinbefore specifically set forth."

The bill averred, further, that under the provisions of the will the one fourth part of the estate became vested in ten grandchildren of whom the plaintiff was one; that the plaintiff arrived at the age of twenty-one years on June 6, 1888; that no partition of the premises described had been made, and that the plaintiff desired such partition. A number of the beneficiaries under the will were averred to be in their minority, and their guardians were named as defendants.

The Commonwealth Title Insurance & Trust Company, trustee, one of the defendants named, demurred to the bill for the reasons:

1. By the terms of the will of Elizabeth G. Sheridan, her executors are given a power of sale to make "a fair and equitable division" of the estate, and under the act of assembly are vested with the freehold, which power extends to an administrator with the will annexed.

2. The bill does not name the present executor of the said will, nor, if it is intended to state that the Joshua T. Owen, who was trustee, is dead, does it give the name of the administrator cum testamento annexo.

3. The bill does not contain any averment that a request for a division or partition of said estate was made of the parties in interest before the filing of said bill.

Others of the defendants, by demurrer or answer, set up the same defences or some of them. The answer of Robert J. Sheridan averred that he had been duly appointed as the administrator d. b. n. c. t. a. of the estate of the testatrix, and that he, as such administrator, and the Commonwealth Title etc. Co. as trustee, had determined upon a plan for the sale of the property under the power of sale granted by the will, before the bill was filed.

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After hearing and argument on the bill and demurrer, the court, without opinion filed, entered the decree, "demurrer sustained."³ Thereupon the plaintiff took this appeal, specifying that the court erred :

3. In making the decree sustaining the demurrer.³

Mr. George L. Crawford (with him *Mr. Geo. M. Dallas* and *Mr. Samuel E. Maires*), for the appellant :

1. The precise question raised by the first of the reasons assigned as cause of demurrer is, whether the power of sale conferred by the will has worked a conversion of the realty, so that the whole estate is now to be regarded as personalty, and therefore not subject to partition : *Bleight v. M. & M. Bank*, 10 Pa. 131 ; *Chew v. Nicklin*, 45 Pa. 86. It is not alleged that the power has been executed, and the only inquiry is whether the will of itself effected a conversion. We submit that the clause containing the power of sale does not work a conversion, and that for several reasons.

2. In the first place, there is no positive and explicit direction to sell ; the will does nothing more than merely to authorize a sale : *Bleight v. M. & M. Bank*, 10 Pa. 131 ; *Stoner v. Zimmerman*, 21 Pa. 394 ; *Chew v. Nicklin*, 45 Pa. 84 ; *Peterson's App.*, 88 Pa. 397 ; *Hunt's App.*, 105 Pa. 141 ; *Barclay v. Kerr*, 110 Pa. 135 ; *Mellon v. Reed*, 123 Pa. 14 ; *Perot's App.*, 102 Pa. 235. Again, the exercise of the power is contingent, and is discretionary with the executors "if they find it necessary" to sell for a particular purpose : *Bleight v. M. & M. Bank*, 10 Pa. 131 ; *Anewalt's App.*, 42 Pa. 414 ; *Chew v. Nicklin*, *supra* ; *Stoner v. Zimmerman*, *supra* ; *Peterson's App.*, *supra* ; *Perot's App.*, *supra*. The authorities cited show that no conversion could take place until an actual sale.

3. Further ; the intention of the testatrix must govern, and, not only is there no positive and explicit expression of an intention to change the quality of the estate by an equitable conversion, but from the language in which the authority to sell is given and from the will, read as a whole, it is apparent that the testatrix did not so intend : see the cases already cited. Conversion is still a question of intention notwithstanding § 13, act of February 24, 1834, P. L. 73 : *Edwards's App.*, 47 Pa. 144. The court below supposed that *Brown's App.*, 27 Pa.

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62; Ruffel's Est., 1 W. N. 286, and Lantz v. Boyer, 81 Pa. 325, were pertinent to this case; but in the first and second cases there were positive directions to sell, manifesting an intention to convert, and in the third, no question of equitable conversion arose.

4. To work a conversion there must be either a positive direction to sell, an absolute necessity to sell in order to execute the will, or such a blending of realty and personalty as clearly shows an intention to create from them one fund and to bequeath the same as money: Hunt's App., 105 Pa. 128; Barclay v. Kerr, 110 Pa. 135; Mellon v. Reed, 123 Pa. 14. There being no conversion, there was no necessity to name the present administrator as a party. The answer of Robert J. Sheridan, however, brings him into court in that capacity. Nor was any request for a division before filing the bill necessary. As some of the parties are not sui juris, partition by agreement in pais could not be made. The bill itself was a sufficient demand for partition.

Mr. William Knight Shryock (with him *Mr. E. Cooper Shapley* and *Mr. J. K. Valentine*), for the appellees:

1. The true meaning and interpretation of the will is that the estate shall be divided into two portions, one of them comprising the three fourths devised to the children of the testatrix for life, and the other consisting of the one fourth part devised absolutely to the grandchildren living at her death. The first portion is devised to the executors in trust for the three children during life, and they are to hold the remainders, after the three life-estates, and also the second portion above mentioned, in trust for the grandchildren during minority. This is an active trust: Dodson v. Ball, 60 Pa. 492; Barnett's App., 46 Pa. 392; Wickham v. Berry, 55 Pa. 70; Earp's App., 75 Pa. 119; and the trust prevents any of the beneficiaries from having such seisin as will entitle them to partition: Hutchison's App., 82 Pa. 509.

2. The clause in which a share is given to the plaintiff "absolutely, when he shall attain his majority," does not favor the plaintiff's position. The whole provision is simply a trust for each of the grandchildren of portions to be paid over at majority, and for this and other purposes of the estate the executors

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and trustees are given the power of sale. The fact that the beneficiaries are confined to grandchildren living at the death of the testatrix, enables her to establish a trust which would otherwise have become a perpetuity: *Philadelphia v. Girard Heirs*, 45 Pa. 9. This is an indication of the intention to create a trust, for there is no other reason, apparently, for the exclusion of afterborn grandchildren. Even if there was not a trust, the plaintiff who is only a tenant in common of an undivided purpart, has no right to this form of relief: *Sweeny v. Meany*, 1 M. 167; *Freeman on Co-tenancy*, § 439.

3. The question of conversion, so extensively discussed by the appellant's counsel, is immaterial in view of the trust which the will establishes. The real question is whether the testatrix has herself provided a method of sale, and whether the right of partition is consistent with the provisions of the will. We submit that the right would destroy the trusts. The whole estate is under the management and direction of the trustee, subject to the control of the Orphans' Court: *Hutchison's App.*, 82 Pa. 514. The view that the testatrix contemplated a right in the plaintiff to take land in severalty, is negatived by the grant to the executors of a power to sell, for, during his minority, by making a sale they could deprive him of that right. The demurrer was the proper mode of raising our defence: *Story's Eq. Pl.*, § 453; *Fletcher v. Tollet*, 5 Ves. Jr. 3.

OPINION, MR. JUSTICE WILLIAMS:

There can be no doubt that the Court of Common Pleas has jurisdiction by bill in this case. Prior to 1845, partition could be made in that court only on the law side, and by action; but the act of March 17, 1845, conferred upon the Supreme Court in and for the Eastern District of Pennsylvania, and upon the Court of Common Pleas of Philadelphia county, jurisdiction in equity in all cases of partition. Afterwards, by the act of February 14, 1857, this jurisdiction was extended to the several courts of Common Pleas throughout the state, so that these courts now have ample power, on the equity side, to make partition in all cases where the title of the plaintiff is clear. The real question raised by this appeal is whether the plaintiff shows such a title as gives him standing in a court of equity.

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The bill sets out that Elizabeth G. Sheridan was in her lifetime the owner of a tract of land in Philadelphia containing about twenty-two acres, with mansion and dwelling-houses, barn and horse-stable, and greenhouse thereon; that she died in September, 1886, leaving a will, which was duly proved, disposing of her entire estate; that by the terms of the said will she directed that her estate be divided into "four equal shares or portions," one of which she devised to each of her three children for and during the term of his or her natural life, and the remaining fourth part she directed should be divided into as many parts as she should leave grandchildren living at the time of her death. These she disposed of as follows: "I give, devise, and bequeath one of said shares to Richard, child of my deceased son Owen, absolutely, when he shall attain his majority, and to be held by my executors in trust for him during his minority." She then gave the other shares in the one fourth to her other grandchildren, naming them, but provided that the share of each be held in trust during his or her minority. Upon the death of each of her three children, she directed that the share held for life by such child should be divided among her grandchildren in the same manner as the one fourth given to them directly by the will was divided; thus securing her entire estate to her grandchildren, to be divided among them per capita. The bill further averred the majority of the plaintiff, and his right to have absolutely the one tenth of the one fourth of the estate under the terms of the will; the death of the executor, Joshua T. Owen, and the appointment of the Commonwealth Title Insurance & Trust Company as his successor in the trust; and that the testatrix left ten grandchildren to survive her, including the plaintiff.

The defendants demurred to the bill, setting out as ground of demurrer that the will contained a clause giving to the executors power "to sell and dispose of the whole or any portion of my real and personal property, at public or private sale, if they find it necessary to do so in order to make a fair and equitable division of my estate." This, it was urged, vested the title to all the estate in the executors, and worked a conversion of the real estate into personal, so that the plaintiff, having no title, could not be heard to ask for partition. The court below sustained the demurrer and dismissed the bill, and this decree is assigned for error.

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The question thus raised is over the construction of the will of Mrs. Sheridan. It is not alleged that the executors had made an actual conversion of the real estate by sale, but the conversion asserted is a constructive one, resting on the clause of the will incorporated into the demurrer. It will be noticed that this clause contains no direction to sell. It gives a power to sell, but it leaves the question whether that shall be exercised or not to the discretion of her executors. If they "find it necessary to do so in order to make a fair and equitable division of my estate," then they may sell, but for no other purpose. If they do not find it necessary to a fair and equitable division, then they have no power of sale. The reason why a power of sale works a constructive conversion is that it makes an actual conversion certain, and the estate is treated as having at once the qualities which, under the terms of the power, it must necessarily have when the power is executed. When, therefore, there is no direction to sell, conversion in fact may never take place, and the reason for the doctrine of constructive conversion does not exist. A bare power to sell is not enough: *Chew v. Nicklin*, 45 Pa. 84. Nor is a power that may be used or not, at the discretion of the executor: *Bleight v. M. & M. Bank*, 10 Pa. 181. But a clear direction to sell for the purpose of making distribution works a conversion: *Brown's App.*, 27 Pa. 62; *Mellon v. Reed*, 123 Pa. 1; and the estate will be treated as having the same qualities, and as distributable in the same manner, before the sale as after.

These cases rule the question now before us. The will contains a naked power of sale, to be used only for a single purpose, and upon the contingency that the executors find it necessary for a fair and equitable division of the estate. This is not enough. Upon looking over the will, we are led to conclude that Mrs. Sheridan regarded the exercise of the power as at least doubtful, and not, in her own view, necessary to the proper division of her estate. This appears in her direction that her son Robert should have the privilege of selecting as or upon his share that portion of the land which had once belonged to him, and which she had bought at sheriff's sale when it was sold from him. This right was made subject to the power of sale, and would have been swept away by its exercise; but, if not thus divested, his right to take the particular land indicated

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is beyond question. But her view of the effect of the power is made evident by the terms she has employed in conferring it. "If they find it necessary," they may sell, but only for one purpose. She says, in effect, "You may sell if you find that you must do so in order to make a fair division in accordance with my will; otherwise, you may not sell. Divide my estate, if you can do so fairly among those entitled to it, without a sale. If you cannot, then you may sell, and make division of the proceeds." Under the terms of this will, the executors held the title of the plaintiff, during his minority, in trust for him; but, when he reached the age of twenty-one years, he came into the legal estate; the trust was at an end, and with it the title of the trustees. He is the absolute owner of the share devised to him in the estate of Elizabeth Sheridan, and that estate has neither been converted into personalty by the act of the executors, nor by the operation of any rule of construction. It follows from what has now been said that the demurrer presented no reason for dismissing the plaintiff's bill, and it should have been overruled. ✓

The decree of the court below sustaining the demurrer is therefore reversed.

ESTATE OF E. L. BUCKNOR, DECEASED.

APPEAL BY A. E. STARR FROM THE ORPHANS' COURT OF
PHILADELPHIA COUNTY.

Argued January 28, 1890—Decided June 4, 1890.

[To be reported.]

1. The Orphans' Court, in distributing the estate of an intestate, may charge against the share of a married daughter the principal of a note given by her to the decedent for borrowed money, notwithstanding that the daughter was at its date legally incapacitated by her coverture from contracting a loan.
2. The daughter, while not technically a bailee of the money for the estate, was bound in equity and good conscience to return it upon repudiating the note, and hence the Orphans' Court, as a court of equity, may treat it as virtually money of the estate in her possession, and make the distribution upon that basis.

136	23
150	311

136	23
166	525

136	23
214	371

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3. A married woman, in her dealings with the world, should be held to the observance of the same good faith to which others are bound; the protection against liability upon contracts which her coverture affords, is for the prevention of fraud, and she should not thereby be enabled, with impunity, to defraud others: Grim's App., 105 Pa. 382.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 166 July Term 1889, Sup. Ct.; court below, No. 414 January Term 1889, O. C.

On April 2, 1889, the account of the Fidelity etc. Company, administrator of the estate of Emeline L. Bucknor, deceased, exhibiting a balance for distribution, was called for audit before PENROSE, J., who on April 18, 1889, filed an adjudication in part as follows:

The decedent died, as represented to the court, January 30, 1887, intestate, a widow leaving five children: Marion B. James, Virginia B. Wormley, William H. Bucknor, Charles Bucknor, and Mrs. Annie E. Starr; and grandchildren and great grandchildren:

In January, 1886, Mrs. Annie E. Starr received from the decedent \$1,000, and gave to her the following paper:

“1886.

“Received of Mrs. E. L. Bucknor one thousand dollars \$1,000 January Thursday 14th will pay \$50 dollars a month—also six per cent interest.

(Signed) Annie E. Starr.”

At the foot of this paper is written in lead pencil: “Rec. from Mrs. Starr \$30 interest on Thursday 10th. E. L. BUCKNOR.”

There is no allegation that the money so received was ever returned by Mrs. Starr; but she was at the time and still is the wife of Henry C. Starr, and now sets up her coverture as a reason for not charging her in distribution with the amount.

It is said on her behalf, first, that the doctrine of advancement does not apply to the distribution of the estate of a mother; and second, that a debt cannot be changed, in cases of intestacy, into an advancement.

1. Under the English statute, grounded on the Custom of London, which never, it is said, affected a widow's personal es-

Adjudication.

tate, it was decided by Lord KING, in *Holt v. Frederick*, 2 P. Wms. 357, though as the reporter says "without much debate," that if a mother, being a widow, advances a child, and dies intestate, leaving many children, the child advanced shall not bring what he has received from his mother into hotchpot; and on the strength of this case, the law is so stated in *Williams on Executors*, 1607. This, however, does not seem to have been the understanding in Pennsylvania: See *Murphy v. Nathans*, 46 Pa. 508, though the auditing judge is not aware of any case in the state where the question has been directly raised. Our statute [act of April 8, 1833, P. L. 315], unlike the Custom of London referred to by Lord KING, is general, and provides for the division and enjoyment of the "real and personal estate of a decedent, whether male or female;" and, though the sixteenth section relating to advancements uses the masculine pronoun, this is evidently in a generic sense; just as in the thirteenth section, which provides that "descendants and relatives of an intestate begotten before *his* death and born thereafter shall in all cases inherit and take in like manner as if they had been born in the lifetime of such intestate;" and § 2, clause III., where it is declared that "if such intestate shall leave descendants in any other degree of consanguinity, however remote from *him* and all in the same degree of consanguinity to *him*, the estate shall descend to and be distributed among such descendants;" and clause IV.: "If such intestate shall leave descendants in different degrees of consanguinity to *him*, the more remote of them being the issue of a deceased child, grandchild, or other descendant, the estate shall descend to and be distributed among them as follows," etc. No one will contend that these sections do not relate to the descent of the estates of females as well as of males.

The precise point has been decided under the New York statute, which differs in no essential respect from ours, in *Kurtz v. Friday*, 4 Dem. R., where the doctrine of *Holt v. Frederick* is rejected, in an elaborate and well considered opinion by the surrogate, Judge Adlington.

2. The cases in which it is said that a debt cannot be changed into an advancement are cases where the liability of the child, as debtor, has been suffered by the parent to become barred by the statute of limitations. In such cases, it is manifest that the

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parent did not intend at the outset to deal with the child in any other relation than that of debtor and creditor; and the relation thus established cannot subsequently be changed without the consent of both parties to the contract. But here, one of the parties being incapable of entering into a contract and now setting up that incapacity, there never was any contract at all.

It is clear that the decedent did not intend that her daughter should keep the amount received by her as a gift; [and the daughter repudiates the idea that it was received by way of loan.]⁴ The result was that the property remained in the mother and continued hers, though in the hands of the daughter. The contract having been void *ab initio*, there never was a debt at all, and the principle that what was once a debt cannot be treated as an advancement, has no application. It is a familiar doctrine that one who avoids a contract by setting up his or her inability to enter into it, must return the consideration: *Badger v. Phinney*, 15 Mass. 859; 2 Kent Com., 240. This, as was said in *Fulton v. Moore*, 25 Pa. 478, applies to the contracts of married women no less than those of infants: "Whether the contract be void or voidable, or whether it be made by an infant or feme covert, is immaterial, because its validity depends not so much upon ratification as upon honesty and conscience, which will not permit any one to unjustly enjoy both the thing itself and its value." The principle was applied to its fullest extent in the recent cases of *Fryer v. Rishell*, 84 Pa. 521, and *Grim's App.*, 105 Pa. 376.

Having got \$1,000 of her mother's property by her contract to return it, and the contract, as she now asserts, being one which she had not the right to make, Mrs. Starr's position is simply that of a person holding the custody of that to which she has no title; and, while at law there would, perhaps, be difficulty in enforcing the return to the estate, the property being money which cannot be followed (it would be otherwise if she had purchased an article for which replevin could be brought), a very different condition of affairs is presented when she comes into a court of equity asking for her share of an estate of which she thus already holds a part. Certainly every principle of morality is against the attempt on the part of the daughter to secure to herself, through the fiction of her want of capacity, a larger share of her mother's estate than can be had

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by her brother and sisters. In this view of the case, the question whether the doctrine of advancements applies to a mother's estate becomes immaterial: the money was not given, and [there was no contract of loan; the daughter, therefore, held merely as custodian or bailee, and will retain what she so holds as part of her share of the entire estate.]³

The \$1,000 in the hands of Mrs. Starr, will, for the purpose of distribution, be added to the balance and charged against her distributive share.

—Thereupon the auditing judge made a distribution of the fund in the accountant's hands, in accordance with the foregoing conclusions.

To this adjudication, Annie E. Starr filed exceptions, alleging that the auditing judge erred in finding that the due-bill for \$1,000 was an advancement and not a debt;¹ in deducting the amount of it from the distributive share of the exceptant,² and in reporting the findings embraced in []^{3 4}

After argument of the exceptions before the court in banc, the following opinion was filed, FERGUSON, J.

The decision of the auditing judge, in this case, was so manifestly equitable and just that, if it were necessary, we would, perhaps, be justified in straining a point to sustain him in the conclusion which he has reached; but there is no necessity to do this, as we think he is sustained by abundant authorities.

A daughter of the decedent had received from her the sum of \$1,000, for which she gave an acknowledgment in writing, and during her lifetime made at least one payment of interest on the same. In the distribution of the decedent's estate it was sought to charge this sum against her distributive share. This was resisted, upon the ground that it was not an advancement, because a mother cannot make an advancement, and, also, because it was a debt; and it was not a debt, because the daughter was at the time a married woman, and, therefore, incapable of contracting any debt. It was not alleged that it was a gift, and if it was, the paper signed at the time, and the payment of interest, negative any claim of this kind. In a word, this daughter holds \$1,000 belonging to the estate of her mother, without any consideration. This she claims to keep, so that, in the distribution of this small estate, she receives \$1,000 more than each of the other five children.

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It is needless to discuss the question whether this money is to be considered as an advancement or a loan, because the daughter repudiates both of these positions, for the reason that to admit either leaves no room to escape from her share being charged with it. The honest and proper thing to do is what she desires to avoid doing; and, to accomplish this desire, she invokes all the technicalities which her coverture throws around her.

Does her coverture permit her to be dishonest? This is the question which this case presents for our consideration.

There is no doubt but that when this money was given to the daughter, it was intended by both parties to the transaction as a loan. The daughter received the money with that understanding. She now says, "I was a married woman and incapable of making a contract, and it is therefore void." She repudiates the contract, but keeps the money which was the fruit of it. This position is so unconscionable that no court of equity would sustain it for a moment.

It is well settled that one who avoids a contract by setting up his or her inability to enter into it, must return the consideration. This was held in *Fulton v. Moore*, 25 Pa. 468, to apply to the contracts of married women as well as those of infants. In the very recent case of *Bigham's App.*, 123 Pa. 262, the Supreme Court say: "Married women have no license to do such unconscionable and unreasonable things as this, especially when they have enjoyed the fruits of the judicial action, which they solicited and procured, for nearly half of a century. Courts of justice are not convenient playthings to be used by designing persons for their private purposes, even though they be married women. Such tribunals cannot be expected to stultify themselves in order to gratify the wrongful or dishonest purpose of a litigant, because she has a husband." In *Grim's App.*, 105 Pa. 382, the court say that "A married woman should be held to the observance of that good faith in her dealings with the world to which others are bound. Her protection is for the prevention of fraud. She should not thereby be enabled with impunity to defraud others." To the same effect, see also *Couch v. Sutton*, 1 Gr. 114; *McCullough v. Wilson*, 21 Pa. 436; *Fryer v. Rishell*, 84 Pa. 521; *Brown's App.*, 94 Pa. 362; *Powell's App.*, 98 Pa. 403.

In this case, the contract of loan having been repudiated by

Arguments.

the exceptant on account of her coverture, it is at an end, and the money should have been returned. As this has not been done, and the money still remains in her possession, we agree with the auditing judge that in order to accomplish justice [she must be considered as holding it as custodian or bailee for the estate, and in the distribution it should be deducted from her share thereof.] ⁵

The exceptions are dismissed and the adjudication confirmed.

—The exceptant then took this appeal, assigning for error:

1-4. The dismissal of the exceptions to the adjudication.^{1 to 4}

5. The conclusion of law set forth in [] ⁵

Mr. F. Carroll Brewster, for the appellant:

1. Although the court below has decided that the due-bill represented neither a gift, a loan, nor an advancement, and that the exceptant is merely a custodian or bailee of the money named in it, the full force and effect to which it would be entitled, as an advancement, has been given to it. The money must have been intended either as a gift, as a loan, or as an advancement. That it can in no manner be considered as an advancement, is settled beyond question by the following cases: High's App., 21 Pa. 288; Harris' App., 2 Gr. 304; Miller's App., 40 Pa. 57; Craig v. Moorhead, 44 Pa. 97.

2. If the intention of the parent was that it should be repaid, it became a loan. The charge of interest is conclusive that this was a loan; and, if it was, it can never be treated as a bailment, else every borrower could be arrested as a bailee, under the criminal code. The court has practically decided that coverture was no defence to an obligation, before the act of June 3, 1887, P. L. 332. The appellant, moreover, does not repudiate the idea of a loan, but contends that the note is in the same position as if barred by the statute of limitations, and she interposes a defence of which the court had no right to deprive her: Shaw v. Boyd, 5 S. & R. 309; Ruchizky v. De Haven, 97 Pa. 202.

Mr. Richard C. Dale and *Mr. Henry C. Terry* (with them *Mr. James F. Bullitt*), for the appellees:

1. The receipt given by Mrs. Starr to her mother shows that the \$1,000 received was not intended as a gift. It must there-

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fore be classed either as a loan, as an advancement, or as a bailment. In view of all the circumstances it may be treated as an advancement: *Weaver's App.*, 63 Pa. 311; *King's Est.*, 6 Wh. 370. The fact that it amounts to nearly one half of Mrs. Starr's distributive share, raises a presumption to that effect. The fact that interest was to be paid does not necessarily show that it was intended as a loan: *Wright's App.*, 89 Pa. 67. The coverture of Mrs. Starr, and the form of the receipt, lead to the conclusion that a loan, which could not be enforced, was not intended.

2. The readiness of the courts to presume an intention to make an advancement, in order to do equity, is shown by *Dutch's App.*, 57 Pa. 461; *Storey's App.*, 88 Pa. 89; *Kirby's App.*, 109 Pa. 41. See also *Holliday v. Wingfield*, 59 Ga. 206. Moreover, the plea of coverture is a practical disaffirmance of the transaction as a loan. There being no assertion that it was a gift, the court took the only other alternative; namely, to treat it as a bailment. But even if the transaction was originally a loan, Mrs. Starr cannot now disaffirm it and yet keep the money: *Fulton v. Moore*, 25 Pa. 478; *Fryer v. Rishell*, 84 Pa. 521; *Heacock v. Fly*, 14 Pa. 540; *Roof v. Stafford*, 7 Cow. 179; *Badger v. Phinney*, 15 Mass. 359; *Roberts v. Wiggin*, 1 N. H. 73 (8 Am. Dec. 38); *Hamblett v. Hamblett*, 6 N. H. 339; *Boyden v. Boyden*, 9 Metc. 519; *Foxworth v. Bullock*, 44 Miss. 457; *Carpenter v. Mitchell*, 50 Ill. 471; *Wilson v. Lawrence*, 8 Hun 593; *Weed v. Beebe*, 21 Vt. 495; *Smith v. Evans*, 5 Humph. 70.

OPINION, MR. JUSTICE STERRETT:

While it is not technically accurate to say that appellant is a bailee for the estate of the money she received from her mother, since deceased, we agree that, having repudiated the note in which she promised to repay it, she was bound, in equity and good conscience, to return it to her mother, or to her personal representative after her decease, and that it may therefore be regarded in equity as money of the estate in her possession. The 'Orphans' Court is practically a court of equity; and, when it appeared that appellant, who was there claiming a full distributive share of her mother's estate, had virtually in her possession money which should have formed a

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part of the fund for distribution, the court might well act on the maxim of equity that what ought to have been done has been done, and proceed to distribute the fund accordingly. As was well said in Grim's App., 105 Pa. 382, "a married woman should be held to the observance of that good faith in her dealings with the world to which others are bound. Her protection is for the prevention of fraud. She should not thereby be enabled, with impunity, to defraud others." The course of procedure adopted by the court below was well calculated to prevent any such result in this case, and we think it is sustainable on reason as well as authority.

It is unnecessary for us to further consider the subject. It has been so fully and ably discussed by the learned judge of the Orphans' Court that, for reasons given in his opinion and the authorities cited in support of them, we are satisfied there is no error in the decree, or in the proceedings leading thereto.

Decree affirmed, and appeal dismissed, at the costs of appellant.

HARRY A. LIMBERT v. JOSEPH L. JONES.

**APPEAL BY DEFENDANT FROM THE COURT OF COMMON PLEAS
NO. 1 OF PHILADELPHIA COUNTY.**

Argued April 10, 1890—Decided June 4, 1890.

In an action wherein the plaintiff seeks to recover damages for the breach of a contract, a notice of special matter, given by him in a former action between the parties, whereby as a defence thereto he set up the same breach of contract and claimed damages therefor much less in amount than he now claims, is admissible as a previous declaration made by him on the subject of the extent of the injury complained of.

Before PAXSON, C. J., STERRETT, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 285 January Term 1890, Sup. Ct.; court below, No. 97 June Term 1889, C. P. No. 1.

On May 31, 1889, Harry A. Limbert brought assumpsit

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against Joseph L. Jones, guardian of Ada L. and Charles O. Herman, minor children of Abraham Herman, deceased. Issue.

At the trial on November 15, 1889, before BREGY, J., it was shown that in 1885, Limbert, the plaintiff, with the consent of Jones, the defendant, bought from Mahlon Schock and Frank B. Basford their interests as lessees, from Jones as lessor, of certain premises at the corner of Eighth and Green occupied as a hotel and restaurant. This lease was to expire according to its terms on March 31, 1887, and Limbert purchased from the tenants, as his testimony tended to show, with the consent of Jones and under an engagement by the latter that he would execute a new lease to him for three years, on the termination of that under which Schock and Basford held. It was also shown, as testified by Limbert, that after his purchase of the leasehold, and upon the faith of the engagement for the renewal referred to, he made valuable improvements upon the property at his own expense; that, in violation of the agreement, Jones, on April 2, 1887, entered judgment in ejectment against him, by virtue of a warrant of attorney contained in the old lease, and dispossessed him: See Limbert's App., 118 Pa. 589; and that he sustained damages to the amount of \$2,500.

The defendant, Jones, denied that he had agreed to execute a new lease to the plaintiff when the old one should terminate, and offered in evidence, *inter alia*, the record of an action to No. 227 June Term 1887, C. P. No. 3, wherein Jones was plaintiff and Limbert defendant, especially the notice of special matter served upon the plaintiff by the defendant therein. It appeared that the action in said cause was brought to recover rent due under the old lease, and therein the defendant, Limbert, pleaded payment with leave, etc., and filed a notice of special matter as follows:

"That some time previous to March 31, 1887, the plaintiff made a new lease of the premises described in the declaration herein for the year commencing first of April, 1887; that in accordance with this lease the defendant continued to hold the said premises until May 26, 1887, until he was ejected from the same by the said plaintiff; that the defendant has paid the rent for the said premises to the plaintiff for the month of April, 1887; that the defendant was forcibly and wrongfully ejected from the said premises on May 26th by the said plaintiff."

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iff, and that the said defendant suffered damage in consequence of said wrongful ejectment in the sum of five hundred dollars."

The record, showing also, that, defendant Limbert failing to appear when the case was called, judgment had been entered for the plaintiff Jones, for the full amount of his claim, was offered "to show by persuasive evidence, the weight of which was to be left to the jury, the falsity of the allegations made by the plaintiff in this case." The plaintiff objected to the admission of said record, "as being immaterial, irrelevant and not *res judicata*, and of the notice of special matter, on the same ground, and because a mere notice is not evidence to defeat the present action."

By the court: Objection sustained; exception.*

The cause having been submitted to the jury, a verdict was returned in favor of the plaintiff for \$1,000. A rule for a new trial having been discharged, judgment was entered, when the defendant took this appeal, assigning for error, *inter alia*, the refusal of the defendant's offer.*

Mr. J. C. Jones (with him *Mr. Charles Davis*), for the appellant.

Counsel cited: *Muirhead v. Kirkpatrick*, 2 Pa. 425; *Koons v. Hartman*, 7 W. 20.

Mr. Wm. Henry Lex, for the appellee.

OPINION, MR. JUSTICE WILLIAMS:

The plaintiff was the tenant of the defendant, and as such in possession of the premises at the northwest corner of Eighth and Green streets. He alleges that he expended money upon the premises and the business, on the promise of the defendant that the lease should be renewed, and that when the lease expired the defendant repudiated the agreement to renew, and instituted legal proceedings to recover the possession. The damages sustained by him in consequence of the refusal to renew, and his ejection from the premises, are the cause of action sued for in this case. The defendant denies that he entered into any agreement to renew, and asserts that if such agreement had been made and violated, as alleged by the plaintiff, the damages claimed for are much beyond those actually suf-

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ferred. In support of the latter proposition, he made an offer, the rejection of which is complained of in the second assignment of error, and raises the important question in this case. The offer was to prove that the defendant brought an action in Common Pleas No. 3 against Limbert, shortly after he had recovered possession of the premises from him, to recover a balance of rent due; that Limbert pleaded payment, and gave notice of the special matter he intended to offer in support of the plea; that in the notice he set out the claim for damages now sued on, and stated the amount of his injury to be about one fifth of the amount now claimed. The offer was objected to by plaintiff's counsel as "immaterial, irrelevant, and not *res judicata*." The notice of special matter was objected to for the additional reason that it was "not evidence to defeat the present action." These objections were sustained by the learned judge who tried the cause, and the whole offer was excluded.

If it be conceded, as it may well be, that the record offered did not show an adjudication upon the claim for damages for the refusal to renew the lease, it ought also to be remembered that it was not offered for that purpose. The purpose of the offer was to show a declaration made by the plaintiff, very soon after he was put out of possession, on the subject of the extent of the injury sustained by him in consequence of the refusal to renew his lease, and the legal proceedings by which he was put out of possession. It did not conclude him on that subject, or prevent his making any explanation of the statement which the notice contained, but it was competent and relevant. The jury might not regard it as very important, but that was a question for their determination. Its admissibility was the only question before the court. The plaintiff was asserting a claim for damages, and supporting it by his own oath as a witness. Very clearly, therefore, his previous declarations upon the same subject were admissible against him, both because they were the declarations of the party, and because they affected, or tended to affect, the degree of credibility to which he was entitled as a witness. It is not necessary to cite authorities in support of a proposition so elementary. The jury had to decide whether the alleged contract for a renewal of the lease was made as alleged by the plaintiff, and, if so, what

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damages were sustained by him in consequence of its breach. He had the right to go upon the witness stand, and give his own version of the contract, and of his losses growing out of its violation; but what he had said when off the stand, upon these subjects, was as clearly competent against him as was his testimony for him. The objections to the offer should, therefore, have been overruled, and the evidence allowed to go to the jury.

The second assignment of error is sustained, the judgment is reversed, and a venire facias de novo awarded.

H. E. ROBENO ET AL. v. M. H. MARLATT ET AL.

APPEAL BY PLAINTIFFS FROM THE COURT OF COMMON PLEAS
NO. 3 OF PHILADELPHIA COUNTY.

Argued January 10, 1890—Decided October 6, 1890.

- (a) The will of a testator devised all his estate to his wife in fee, and appointed her his executrix with full power to sell and convey. Children were born after the date of the will, and for them no provision was made therein.
 - (b) By a deed reciting the devise to her in fee but not indicating that she conveyed or intended to convey under the power, or that the deed was made in the course of the administration of the estate, the widow afterward conveyed the real estate devised to her:
1. In such case, the provisions of § 1, act of June 4, 1879, P. L. 88, were inapplicable; and, under § 15, act of April 8, 1883, P. L. 251, the after-born children were entitled to the same interest in the real estate of testator, "as if he had actually died without any will."
 2. Such children are not required to look only to the proceeds of the sale made by the widow, as that requirement would deny to them the interest in their father's estate to which they are entitled under the statute.

Before STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM
and MITCHELL, JJ.

No. 361 January Term 1889, Sup. Ct.; court below, number and term not given.

136	85
164	522
136	85
199	140

186	85
211	1883

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On December 1, 1887, Helen E. Robeno and Andrew T. Robeno, minor children of Andrew Robeno, Jr., deceased, by their guardian, Robert E. Pancoast, brought ejectment against Mary H. Marlatt, Sallie A. Marlatt, Mary Kennedy and Thomas Kennedy. Issue.

At the trial on October 24, 1885, the jury returned a special verdict finding the following facts:

Andrew Robeno, Jr., died, testate, on January 17, 1885, seised of the property in dispute, to wit, a house and lot on Wistar street, and leaving to survive him a widow, Helen A. Robeno, and issue as follows: Mary P. Robeno, born May 9, 1882; Helen E. Robeno, born November 29, 1883, and Andrew T. Robeno, born September 5, 1885. Mary P. Robeno died on June 5, 1885. Robert E. Pancoast was duly appointed guardian of Helen E. and Andrew T. Robeno.

By his will, dated September 2, 1881, said Andrew Robeno, Jr., deceased, devised and bequeathed all his estate, real and personal, after payment of debts and funeral expenses, to his widow Helen A. Robeno, "her heirs and assigns absolutely forever," and provided:

"And I do nominate, constitute and appoint my said wife, Helen A. Robeno, to be the sole executrix of this, my last will, with full and complete power and authority to sell and dispose of all or any part of my said estate in her discretion, and with full power and authority to make, seal, execute and deliver all such deed or deeds of conveyance, and all other assurances in the law, requisite to vest a good and perfect title thereto, unto all such purchaser or purchasers thereof."

Said will was duly admitted to probate on February 13, 1885, and letters testamentary issued thereon to said Helen A. Robeno, who on April 16, 1887, conveyed the property in dispute to Mary H. Marlatt and Sallie A. Marlatt, by a deed which described the grantor as the widow of Andrew Robeno, Jr., and, after designating the property conveyed, proceeded:

"Being the same premises which Thomas Hare and wife, by indenture dated the thirteenth day of November, A. D. 1873, recorded in Deed Book F. T. W., No. 82, page 338, etc., granted and conveyed unto the said Andrew Robeno, junior, in fee. And the said Andrew Robeno, junior, being so seised, departed this life, and by his last will and testament, dated the

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second day of September, A. D. 1881, duly proved at Philadelphia the thirteenth day of February, A. D. 1885, he gave and devised all the rest, residue and remainder of his estate, real, personal and mixed, unto his wife, the said Helen A. Robeno in fee; together with," etc.

The defendants Mary Kennedy and Thomas Kennedy were tenants of Mary H. and Sallie A. Marlatt, who were in possession of the property in dispute under said deed.

On January 16, 1889, after argument of a motion by the plaintiffs for judgment on the special verdict, the court, FINLETTER, P. J., filed the following opinion:

The plaintiffs claim as the children of Andrew Robeno, Jr., born after he had made his will, which was dated September 2, 1881. He died in 1885. The defendants claim as grantees of his executrix, who conveyed under the power to sell in the will.

Under the act of April 8, 1833, the plaintiffs would have been entitled to recover. It is claimed, however, that the act of June 4, 1879, bars their right. This act has received judicial construction, the results of which are, that as to the condition of the donees the will speaks as of the date; as to the subjects of the testamentary disposition, the will is construed as of the death; as to the objects, that is, the persons who are to take under it, and their condition, the will speaks as of its date; as to the testator's condition, it is to be considered as of its date. The act is restricted in its effect to the real and personal property passing under it. It would appear from these decisions that the claim of the plaintiffs is well founded, unless they are barred by the power of sale given to the executrix in the will. It is contended that she had an absolute title under the will, and that the power of sale was therefore nugatory; and that she conveyed in her own right, and not under the power given to her by the will.

If the children's interest did not pass by the will, then she did not take title to the whole of the property. It must therefore be assumed that the power was necessary to enable her to convey the entire estate. Whether she conveyed by virtue of the estate given to her by the will, or under the power of sale, is not to be determined alone from the terms used in making the conveyance, perhaps not at all by them.

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We have not been referred to analogous cases, although the subject of powers, generally, has been discussed here and elsewhere. To understand clearly what has been decided, it seems to be necessary to consider the facts upon which the decisions have been made, and the principles and reasons upon which they are founded.

It is well known that English conveyancers and judges were persistent in their effort to relieve real estate from the restrictions which were thrown around its transmission. From this resulted uses, and trusts, and powers, and appointments. Mr. Sugden, in his work on powers, has given the line of decision with proper comments, in which we may find a few principles for our guidance.

It should be recollected that uses and powers qualified the estates upon which they rested. The courts gave relief from these restrictions, when it could be done without injury to the rights of others; as, when the grantor had the fee with the power of limitation, and conveyed without exercising the power, the purchaser took the land without limitation. If, however, the limitation was in another, the purchaser took a qualified fee.

There were cases in which the intention of the grantors, grantees, or the testators became essential elements in their determination. This intention was not the intention to exercise the power, but the intent of the parties as to the estate which was conveyed. "The principle attempted to be established, viz., that there must not only be an intention to dispose of the property, but also to dispose of it under the power, was strongly observed upon in argument at the bar of the House of Lords, and the author, who had to sustain the decision, felt himself unable to support the doctrine advanced in the judgment. If the intention to pass the property can be collected, it will pass under the power, although the donee supposed that it would work by force of his interest. There is no conflict; he intends the property to pass, and thinks he has all the interest in it, whereas he has only a power. The intention governs, and the power will support the disposition. It is intention, then, that in these cases, governs:" Sugden on P., 440. The estate which was intended to be conveyed passed without regard to the form of conveyancing, provided the interests of other parties were not affected.

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—Citing *Hay v. Mayer*, 8 W. 203; *Wetherill v. Wetherill*, 18 Pa. 272; *Drusadow v. Wilde*, 63 Pa. 172, the court proceeded:

It may be inferred from these citations that the intention which governs is not an intention to exercise the power, but the intention to convey the land in accordance with the will of the testator. In other words, the mere form of conveyance is to be disregarded, and the effect in passing the lands to be considered as indicating the intention of the parties and the directions of the will. If the power covers the whole land and fee, the conveyance will be referred to the power; and if it be less, and the grantor's interest unrestricted, the conveyance will be referred to the grantor's interest.

The power given to an executor to sell and receive the purchase money is intended to relieve the purchaser from all apprehension and thereby secure the best price. In this respect it differs widely from powers given for the purpose of limiting the estate. It should therefore receive a liberal construction. In the present case, there can be no doubt that the testator desired that an unqualified fee should pass to the purchaser for the whole property. It must be presumed that he made his will with a knowledge of the laws affecting wills, and that, under certain contingencies, the estate given to his wife would be for but a portion of the property. It must also be presumed that the executrix and the purchaser considered the will as the authority by which she conveyed, and that they knew the title which she took under the law, and the power she had by virtue of the will, and that the conveyance was made under this knowledge.

The whole property, the subject of the power, was conveyed for a full consideration, and the grantor refers in the conveyance to the will as the source of her right to convey. The intention to convey the entire estate is manifest, and the conveyance should be referred to the power of sale.

Judgment is therefore entered for the defendants.

—Judgment having been entered as directed, the plaintiffs took this appeal, specifying that the court erred in entering judgment for the defendants on the special verdict, and in not entering judgment for plaintiffs for the land in dispute subject to the life-estate of Helen A. Robeno, widow, in five ninths of the property in dispute.

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Mr. W. B. Broomall, for the appellants.

That, under § 15, act of April 8, 1833, P. L. 251, after-born children, unprovided for in the will, are entitled as though testator died intestate, counsel cited: *Walker v. Hall*, 34 Pa. 483; *Edwards's App.*, 47 Pa. 144; *Grosvenor v. Fogg*, 2 W. N. 709; *Willard's Est.*, 68 Pa. 327. That the power of sale in the will did not continue operative against the plaintiffs notwithstanding the act of 1833: *Coates v. Hughes*, 3 Binn. 498; *Hollingsworth's App.*, 51 Pa. 518; § 1, act of April 20, 1869, P. L. 77; *Hoover v. Landis*, 76 Pa. 354. But, if it did, there was nothing to indicate an intention to exercise a power of sale, much less a power of sale to pay debts: 1 Sug. on P., 421; *Hay v. Mayer*, 8 W. 203; 4 Kent Com., 328; *Wetherill v. Wetherill*, 18 Pa. 265; *Bingham's App.*, 64 Pa. 349; *Jones v. Wood*, 16 Pa. 42. That the plaintiffs' rights were unaffected by § 1, act of June 4, 1879, P. L. 88: *Carl's App.*, 106 Pa. 635; *Fidelity Co.'s App.*, 108 Pa. 492; *Neale's App.*, 104 Pa. 214.

Mr. H. C. Thompson, for the appellees.

Counsel relied upon the opinion of the court below, and cited: *Hollingsworth's App.*, 51 Pa. 518; *Coates v. Hughes*, 3 Binn. 498; act of June 4, 1879, P. L. 88. It was also argued that the plaintiffs had mistaken their remedy; "their mother must account to them for her administration of their father's estate; and, with the price of the land in her pocket, the pursuit of her grantees was unconscionable."

OPINION, MR. JUSTICE STERRETT:

The question in this case arises upon the facts established by the special verdict, in substance as follows, viz.:

Andrew Robeno, Jr., became the owner in fee of the lot in controversy by purchase in 1873, and died seised thereof in January, 1885, leaving to survive him a widow, Helen A. Robeno, and three minor children: Mary P., born May 9, 1882, and died June 5, 1885; Helen E., born November 29, 1883, and Andrew T., born September 5, 1885, several months after his father's decease. The two latter, by their guardian, Robert E. Pancoast, are the beneficial plaintiffs in this suit.

The defendants, Mary H. and Sallie A. Marlatt, claim as vendees of the widow, Helen A. Robeno, to whom her husband

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by his last will and testament, dated September 2, 1881, before either of his children was born, devised the lot in controversy, etc. On the other hand, it is contended on behalf of the plaintiffs, that inasmuch as their father's will, in which no provision is made for his after-born children, was executed before they and their deceased sister were born, he must be deemed to have died intestate as to all his children; and hence they are entitled to the possession of the real estate of which he died seised, as if he had actually died without any will, subject however to the life estate of their mother in five ninths thereof, which by her deed is vested in the defendants. This contention is based on § 15, act of April 8, 1833, which is as follows:

“When any person shall make his last will and testament, and afterwards shall marry or have a child or children not provided for in such will, and die leaving a widow and child, or either a widow or child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the widow, or child or children after-born, shall be deemed and construed to die intestate, and such widow, child or children, shall be entitled to such purparts, shares, and dividends of the estate, real and personal, of the deceased, as if he had actually died without any will.”

In the court below, the case was submitted to the jury, who rendered a special verdict, embodying the facts of which the foregoing statement is the substance, and submitted to the judgment of the court whether, upon the facts so found, their verdict should be for the plaintiffs or for the defendants. The special verdict also provides “that if judgment be entered for the plaintiffs, it shall be for the premises described in the writ, subject to the life-estate of Helen A. Robeno in five ninths thereof,” etc. Judgment was entered in favor of the defendants on the special verdict, and the sole question raised by this appeal is whether the court erred in so doing.

The facts established by the special verdict bring the beneficial plaintiffs within the very letter as well as the spirit of the act of 1833, above quoted, and entitle them as afterborn children, for whom no provision is made in the will of their father, to the same interest in the real estate of which he died seised “as if he had actually died without a will;” and, unless there is something to take their case out of the operation of the act, the judgment should have been in their favor.

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The learned president of the Common Pleas correctly held that their right is not affected by the act of June 4, 1879, but he came to the conclusion that the deed of April 16, 1887, from the widow to the defendants, was a good execution of the power of sale given her by the will, and hence the plaintiffs were barred of their right of possession, and must look to the fund realized by the sale. In that we think he was mistaken. The power of sale, contained in the third clause of her husband's will, is given to Mrs. Robeno in connection with the devise of all his real estate to her, "her heirs and assigns absolutely forever." In her deed to two of the defendants, she conveys in fee, not by virtue of the power of sale, but as sole devisee of her husband. The lot is described as being the premises which Thomas Hare and wife, by deed dated November 13, 1873, conveyed in fee to Andrew Robeno, Jr., who, dying seised thereof, devised the same in fee to his wife Helen A. Robeno. There is nothing whatever, either in the deed itself or dehors that instrument, to indicate that she conveyed or intended to convey by virtue of the power of sale specified in the will, or for the purpose of paying debts; nor does it appear that there were any unpaid debts of the testator. It is not pretended that the sale was made in the due course of administration. So far as appears by the special verdict, it was made in the vendor's own right and for her own benefit.

It is true that, as to after-born children, a will is not absolutely void, but is void only in so far as the shares of the children are affected by it: *Coates v. Hughes*, 3 Binn. 498. The appointment of a testamentary guardian, and a power of sale for the payment of debts, have been upheld against such children, because they are not in conflict with either the letter or spirit of the act of 1833, above quoted. The appointment of a testamentary guardian relates only to the custody of the minor's person and management of his estate. It cannot affect his interest as distributee under the intestate law. A power of sale for the payment of debts, like the appointment of an executor, relates to the administration of the estate, payment of debts, etc. The claims of creditors are of course superior to the rights of heirs or distributees. The latter take nothing until the decedent's debts are paid. Hence, a power of sale for the payment of debts, and the execution thereof,

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cannot injuriously affect the right of afterborn children "to such purparts, shares, and dividends of the estate real and personal," of their deceased parent, "as if he had actually died without any will."

The language of the act is clear and explicit; and as heretofore construed by this court it undoubtedly applies to the facts of this case and sustains the contention of the plaintiffs: *Walker v. Hall*, 34 Pa. 483; *Edwards's App.*, 47 Pa. 144; *Willard's Est.*, 68 Pa. 327; *Grosvenor v. Fogg*, 2 W. N. 709; *Hollingsworth's App.*, 51 Pa. 518. To require the plaintiffs to look only to the proceeds of the sale made by their mother would be denying them that interest in their father's estate which the act declares they are entitled to, namely, "such purparts, shares, and dividends of the estate, real and personal, of the deceased, as if he had actually died without any will." The specifications of error are sustained.

Judgment reversed; and judgment is now entered on the special verdict in favor of the plaintiffs for the premises described in the writ, subject to the life estate of Helen A. Robeno in five ninths thereof, which is vested in the defendants.

ESTATE OF GEORGE L. OLIVER, DECEASED.

APPEAL BY MERCHANTS' FUND ASS'N FROM THE ORPHANS' COURT OF PHILADELPHIA COUNTY.

Argued January 10, 1890—Decided October 6, 1890.

[To be reported.]

- (a) The articles of association of a joint-stock company, formed for the purpose of purchasing, developing and selling mineral lands, provided that the property of the association should be vested in trustees, chosen from among the stockholders, who should have power to purchase, sell and convey both real and personal property.
- (b) The articles provided, further, that the interest of each member of the association, in its property, should be represented and measured by his shares of stock, which should be transferable by assignment, re-

136	43
140	355
136	43
153	337
136	43
164	330
136	43
173	195

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corded in the books of the company, and a surrender of the original stock certificate :

1. Whatever the liability of the members to third persons may be, such an association is an artificial person, capable of acquiring, holding and selling property in its associate capacity ; the stockholders therein have no title to its lands, but merely a resulting interest in its assets ascertainable only by an account.
2. Such company is not dissolved by the death of a member, nor is the nature of his interest as a stockholder such that it is changed thereby ; and a dividend declared upon the stock after his death has the same character, and is governed by the same rules, as though declared in his lifetime.
3. Wherefore, when a testator, owning such stock, has bequeathed the income of his estate to one person for life, with a gift of the principal to another in remainder, a dividend upon the stock out of the proceeds of a sale of land, made after his death, the association still retaining its capital unimpaired, is income within the terms of the will.
4. Such income, though amounting to more than 1,000 per cent upon the capital, must go to the life-tenant, if earned after the testator's death : Earp's App., 28 Pa. 368 ; and it must be regarded as so earned when the profit on the sale of the land was due to a discovery of mineral deposits after his death, though that discovery was not made by the company itself.

Before STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 418 January Term 1889, Sup. Ct. ; court below, No. 532 April Term 1887, O. C.

On December 5, 1888, the first account of James B. Chandler and Catherine M. Richardson, as trustees under the will of George L. Oliver, deceased,* wherein the accountants charged themselves with principal amounting to \$612,822.21, and with income amounting to \$151,139.02, was called for audit before HANNA, P. J., who afterwards filed an adjudication, finding the following facts :

The account was conceded to be correct, except in the single particular hereinafter referred to, and the assets, being securi-

* These accountants were the executors of the testator's will. On October 29, 1887, their account as such having been settled and audited, the Orphans' Court, holding that the will constituted them trustees of the residuary estate during the life of Catherine M. Richardson, awarded to them the principal thereof, to hold in that capacity : See *Oliver's Est.*, 20 W. N. 318.

Adjudication.

ties and investments of the estate, in the custody of the trustees, and belonging to the corpus of the trust estate, were found to be in their possession and custody, as set forth in the account.

The annexed is the first account of the trustees, their account as executors having been heretofore filed, audited and confirmed by the court, and the balance of principal of the estate was awarded to them as trustees under the will of testator.

Among the securities and investments thus awarded to the accountants, and which were the property of testator in his lifetime, are 5,582 shares of stock in the Metalline Land Company, appraised for the purposes of the inventory and appraisal at the sum of \$5; not \$5 per share, but \$5 for the whole number of shares. The single question now for determination arises from this investment by testator. And it should here be stated that the entire number of shares is still in the hands of the trustees.

On November 3, 1883, the trustees received from the Metalline Land Company, a dividend of \$19.50 per share, amounting to the large sum of \$108,849, and with which they charge themselves in their annexed "Income Account."

At the hearing before the auditing judge, Messrs. Henry and Junkin, for the Merchants' Fund Association, claimed that said sum of \$108,849 was improperly included by the trustees in their account as income, and that it should be stricken therefrom and transferred to the principal account, for the reason that it did not represent income, but principal of the estate. This was objected to by Messrs. Dale and Olmsted, who contended that said sum was strictly dividends and profits, and therefore properly included in the income account. Thus, the single question in dispute is presented.

In order to arrive at a correct determination, it is necessary to refer to certain facts appearing from the evidence before the auditing judge.

George L. Oliver, the testator, died June 3, 1886. On December 15, 1862, he with three other persons entered into articles of agreement bearing that date, whereby they "agreed to associate themselves together under the name of the Metalline Land Company of Lake Superior, for the purpose of purchasing lands, and developing mines of copper and other valuable minerals and disposing of the same." "And in order more

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effectually and advantageously to manage the property and improve and make sales thereof, and to prosecute the business of said company, the parties hereto severally and individually agree each with the other that the following shall be the articles of mutual agreement and association forever binding upon each of the said parties while they are stockholders in the company."

By article 2 of this agreement, it was provided that, "the property of the company shall be divided into twenty thousand shares of five dollars each, each of which shall entitle the proprietor to one undivided twenty thousandth part of all property which now belongs to or may hereafter be acquired by the company, or which may hereafter be in any way held by the trustees hereafter named, or their successors in said trust, for the use and benefit of the said company." Of the 20,000 shares, into which the capital stock of the company was divided, Mr. Oliver subscribed for 3,900 shares, but afterwards became the owner of additional shares, so that at his death he owned, as stated, 5,582 shares.

The articles of association also provided that "the shares of the company shall be issued to the proprietors of the lands, in proportion to their respective interests in said lands, liable to no more than five dollars per share assessment, and the board of trustees shall have authority to make a requisition upon their several stockholders for the payment of such instalments upon the shares held by them, whenever they may deem it necessary or expedient," etc. And by article 5, it is provided that, "the funds and property of this association shall be vested in three trustees, to be held by them as joint tenants, ... and no person shall be a trustee who is not a stockholder in the company." By article 6, it is, *inter alia*, provided that an annual meeting of the company shall be held, other meetings shall be called, and each stockholder shall be entitled to one vote for every share held by him, etc. By article 8, it is provided that the trustees "shall have the entire control and disposal of the property of the company, both real estate and personal; make such purchases, conveyances, sales or contracts, and expend all moneys, and dispose of all other property in such way as they may deem for the interest of the company," etc. They are also authorized "to execute and de-

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liver warranty, mortgage, or other deeds of all or any portion of the property held by the company, in such ways as they shall judge best calculated to promote the objects of the company and advance the interests of the stockholders. They shall make such improvements and explorations of the lands of the company as they may deem expedient, in order to develop their value and facilitate their sale," etc. By article 9, the trustees are authorized "from time to time (to) declare and pay out dividends of profits to the several stockholders." Article 10 prescribes the form of certificate to which every stockholder is entitled, certifying his property in the shares expressed by the certificate. And, by article 11, it is provided that "this company may at any time become incorporated, whenever it shall be so determined by a vote at a regular meeting of the stockholders, at which a majority in interest are present," etc.

The company, however, never was incorporated, and still continues to transact its business through trustees, as provided in said articles of association. It also appeared that the individuals who became party to said articles of association and agreed to form said company, did not pay or contribute the sum of \$5 per share for each share of stock subscribed by them, but only the sum of \$1.90 per share. This was paid in six instalments or assessments called in between March 22, 1864, and May 24, 1881, and the sum of \$38,000 thus realized constituted the entire working capital of the company.

The first purchase of land by the trustees was early in 1864, when they purchased 1,200 acres of land in Michigan, which were valued at \$25,000, and the first instalment of \$1.25 per share was then called in. They soon began to sell land and make other purchases, and acquired in all between ten and eleven thousand acres. Between 1864 and 1882 they sold nearly 10,000 acres, and had remaining 600 acres. It appeared that the sales were made partly for cash, and partly in stock of the mining companies purchasing the lands; so that when the trustees declared the first dividend on March 22, 1864, it was \$1.25 in cash and five shares of the Reliance Mining Company's stock to each ten shares of the Metalline Land Company's stock, and six shares of the Vulcan Mining Company's stock to each ten shares of the Metalline Land Company's stock.

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The next dividend was on May 1, 1865, of fifty cents in cash per share. The trustees, however, continued to make sales of the lands of the company, but declared no further dividends.

At the death of testator in June, 1886, the trustees still held unsold, as stated, 600 acres of land. By reason of developments upon the lands adjoining those held by the trustees and which formerly belonged to them, it became the opinion of mining experts that the lands still held by the trustees contained deposits of copper ore of immense value. A great excitement ensued, and producers of copper, and investors, and speculators in copper-mining stocks, became convinced of the existence of mines of untold wealth buried in the lands of the Metalline Land Company. These lands immediately appreciated in value beyond the most sanguine expectations of the trustees, and in October, 1888, they sold to the Calumet and Hecla Mining Company 40 acres, for the sum of \$500,000 in cash, or \$12,500 per acre. And they still have on hand 560 acres, whose value is unknown and cannot be determined except by actual sales.

On November 2, 1888, the trustees held a meeting, and, by advice of counsel, declared a dividend of \$19.50 per share to the holders of the stock of the Metalline Land Company. And thus the present accountants received the sum of \$108,849, with which they charge themselves as *income* belonging to the trust estate.

In pursuance of the will of testator, and by reason of the death of her husband, Mrs. Catherine M. Richardson, daughter of testator, is entitled during life to "all the net rents, issues, profits, and income of the remainder and residue of my estate, real, personal, and mixed, of which I may die seised." And by the succeeding item of his will, testator gave, devised, and bequeathed "the principal of the said residue and remainder of my estate," after the deaths of his daughter and her husband, to the Merchants' Fund Association, for a perpetual fund, to be called the Oliver Fund, the income of which fund shall be used for providing, or assisting to provide, comfortable homes and support for indigent and infirm old merchants of Philadelphia. . . .

—Upon the facts above stated, the auditing judge, citing *Kramer v. Arthurs*, 7 Pa. 165; *Morrow v. Brenizer*, 2 R. 188;

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Allison v. Wilson, 13 S. & R. 330; Bridge Co. v. Commonwealth, 117 Pa. 265; Vinton's App., 99 Pa. 434; Biddle's App., 99 Pa. 278; Moss's App., 83 Pa. 264, found, as a conclusion of law, that the dividend of \$108,849, received by the accountants from the Metalline Land Co., was income, and awarded the same to Mrs. Catherine M. Richardson, as legatee for life.

Exceptions to the adjudication, filed by the Merchants' Fund Association of Philadelphia, having been argued before the court in banc, were dismissed on March 2, 1889, opinion by FERGUSON, J.: *

It seems to be settled as the law of this state that the surplus earnings of a corporation, which have accumulated in the lifetime of the testator but which were not divided until after his death, belong to the corpus of his estate; but that dividends declared, which have been actually earned since the death of the testator, belong to the income and are payable to the life-tenant, no matter whether such dividends are in cash, stock or scrip. The test seems to be, that what has been earned, accumulated, and actually existing in the lifetime of the testator, is principal, but what is earned after his death is income: Earp's App., 28 Pa. 368; Moss's App., 83 Pa. 264; Biddle's App., 99 Pa. 278; Wiltbank's App., 64 Pa. 256; Thomson's Est., 11 W. N. 482, and Phila. Trust Co.'s App., 1 Mona. 230. As was said by PAXSON, J., in Moss's App., 83 Pa. 264, "We are in no doubt about the law; that can be ascertained with mathematical precision. The difficulty is in applying the principles of law, however well settled, to the facts of a particular case." This case furnishes an illustration of this difficulty.

When this testator died there came into the hands of his executors and trustees 5,582 shares of stock in the Metalline Land Company of Lake Superior, which were appraised at \$5. This seems to have been all the value that was placed upon these shares by competent persons at that time.

This company had been formed by the testator and others in 1862, "for the purpose of purchasing lands and developing mines of copper and other valuable minerals, and disposing of the same." It was not incorporated; and, although it carried

*For dissenting opinion, PENROSE, J., see Oliver's Est., 24 W. N. 141.

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on its business in much the same way as a corporation, it must be regarded as what it in fact was, a partnership. It was organized under articles of association, whereby the holding of the titles to the lands as joint tenants, the management of the business of buying and selling lands, and of declaring dividends upon the profits thereof, was vested in three trustees. The capital stock of the company was represented by 20,000 shares, divided among the several stockholders according to their respective interests. The total amount of capital paid in was \$38,000.

This company did nothing in the way of developing mines, but confined its operations to speculating in lands; so that between the time of its organization and the year 1882, about 10,000 acres of land were bought and sold. These sales were made at different times to different purchasers, and out of the profits thereof dividends were declared and paid to the stockholders. At the time of the testator's death, 600 acres remained in the hands of the trustees undisposed of; and it does not appear that for a number of years before his death there had been much, if anything, done by the trustees, except keeping up the organization of the company and making assessments upon the stockholders for the purpose of paying expenses, taxes, etc. There had been no sales of land for some time.

This was the status of affairs at the time of the testator's death in June, 1886. Over two years afterward, as found by the auditing judge, "by reason of developments upon lands adjoining those held by the trustees, and which formerly belonged to them, it became the opinion of mining experts that the lands still held by the trustees contained deposits of copper ore of immense value. A great excitement ensued, and producers of copper, and investors, and speculators in copper-mining stock, became convinced of mines of untold wealth buried in the lands of the Metalline Land Company. These lands immediately appreciated in value beyond the most sanguine expectations of the trustees, and in October, 1888, they sold to the Calumet and Hecla Mining Company forty acres for the sum of \$500,000 in cash, or \$12,500 per acre." The trustees then passed a resolution declaring "a dividend out of the profits arising from the sale of land to the Calumet and Hecla Mining Company of \$19.50 per share," and there was paid to the accountants on

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the shares held by them \$108,849. The trustees have still on hand, belonging to the company, 560 acres of land, and a large sum of money in cash greatly in excess of the capital, so that it was not impaired by this dividend.

The testator by his will gave unto his daughter "all the net rents, issues, profits and income" of his estate, and the question raised is whether this dividend was principal or income. For the purpose of determining this question, let us first consider what were this company's objects and purposes, whether the business was one that was recognized by law, and what was the status of the several stockholders therein, with reference to the real estate held by it and the profits made by any sales thereof.

All these questions were settled by the Supreme Court in *Kramer v. Arthurs*, 7 Pa. 165, in the case of the Pittsburgh Land Company, which was an unincorporated company organized to deal in lands, as this was. Chief Justice GIBSON says: "That an incorporated joint-stock company is an ordinary partnership, and that there may be a partnership to deal in lands, are elementary principles that have not been disputed. The latter was expressly recognized by this court in *Brady v. Colhoun*, 1 P. & W. 147. 'Partnerships,' says Gow on Partnership, 6, 'are not necessarily confined to trades in commercial adventures. They may lawfully exist in cases unconnected with commercial speculations. For instance, a partnership may exist between attorneys or farmers, as well as between merchants or bankers.' It would be absurd to let the nature of the article dealt in change the nature of the contract; or not to let partners give to land the attributes of a commodity, as between themselves and those standing in their places, especially in a country where it is a chattel for the payment of debts, and not unfrequently a subject of speculation. Where it is brought into a concern as stock, it is, as between the partners and a person who has knowingly dealt with one of them for it, to be treated as personal estate belonging, not to the partners individually, but to the company collectively. The members of this company, being sharers of profit and loss, were partners to the world; but, between themselves, they had only a contingent interest in the profits to be derived from the lands when the concern should be wound up, not a vested estate as

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tenants in common of the lands themselves; and, to a purchaser with notice or its equivalent, neither of them could part with more, either by a voluntary or involuntary conveyance."

The interest of the estate of George L. Oliver, then, was not a vested estate in the lands, but a contingent interest in the profits to be derived from them when sold. If this position is correct, then there is no force in the argument urged by the remaindermen, that as the copper in these lands was what made them valuable, and it existed at the time of the testator's death, the value was then there, and although its extent was not ascertained, its product must be regarded as part of the corpus of the estate.

The force of this argument is still more weakened when we consider that the intrinsic value of the land sold is not even ascertained to-day. The price at which it was sold was purely a speculative one, and based, perhaps, upon a fictitious valuation, resulting from the excitement incident to the supposed discovery of a valuable vein of copper ore. Time may yet develop the fact that there is no increased value in the land, or, if there is, it has been greatly over-estimated. There have been too many hundreds of thousands of dollars lost by people who have bought land, supposing that the bowels of the earth were filled with treasures of gold, silver, coal, etc., to conclude that in this case the value must necessarily be there because the consideration was paid for it. As it is uncertain to-day whether the value supposed to be in these lands exists, of course it is equally uncertain as to whether it existed at the time of the death of the testator; but, whether it existed or not can make no difference, for the interest of the testator therein was not in the lands, but in the prospective profits of a company dealing in them, in which company his interest was represented by the number of shares of stock which he held.

The next consideration is whether the phenomenal "profit" was earned since the death of the testator. Perhaps the fact that this profit is so extraordinarily large is the reason why we have this case to consider. If it had been an ordinary dividend upon these shares the right of the life-tenant thereto would not have been called in question, but the principles which govern must be the same, without regard to the amount. The general meaning of the word "earn" is "to acquire by labor, service or

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performance: to deserve and receive as compensation;" and, whenever we use the word, it necessarily implies some labor or service for which the earnings are the reward. In this case, the company did nothing upon these lands after the death of the testator, and for a number of years prior thereto. In fact, it does not appear that it ever did anything but buy the land, pay the taxes as they fell due and payable, and wait for an opportunity to sell as customers offered. This seems to have been the object and purpose of the organization, to buy and sell lands; and, as it had abandoned the scheme of developing land for mining purposes, this, then, was the only way by which it could earn any profits for the shareholders.

Now, it so happened, that over two years after the testator's death, while the company was carrying this land in pursuance of the purposes of its organization, as just stated, by reason of a fortunate circumstance a purchaser was found for a small portion of it at an enormous price, and a large profit was realized on these shares of stock, which at the time of the testator's death were appraised at a mere nominal sum. Now, when was this profit earned? The profit was the fruit of the sale; and a sale for the purposes of profit was the object of the company's organization. It seems to us that the profit was earned when the sale was accomplished. There had been nothing done before that time to earn this profit, and all that was then done was the action of the trustees of this company in taking advantage of this speculative "boom" in copper mines, and then negotiating this very advantageous sale of a part of this land before the bubble would burst. The effecting of this sale is how the profit was earned, and as this took place long after the death of the testator, we think it is a profit which, under his will, belongs to his daughter.

The exceptions are dismissed and the adjudication confirmed.

Thereupon the exceptant took this appeal, specifying that the court erred:

1. In awarding the dividend of \$108,849 to Mrs. Catherine M. Richardson as income, and in not holding it to be principal, and awarding it as such to the trustees under the will.

Mr. James Bayard Henry and Mr. George Junkin, for the appellant:

Arguments.

1. All that the court said about "excitement," "speculation," "boom," "intrinsic value," and "bubble" bursting, is unwarranted by any evidence in the case. There is nothing to justify the suggestion that the land sold was not really worth the sum which it brought. If it was, it had the same intrinsic value at the death of Mr. Oliver, and there has been no gain, income or profit made or earned since his death. It may, for the purpose of the argument, be conceded that the land company was simply a partnership; the opinion of the court below is based upon this assumption. But there is no authority that declares an appreciation in the value of the assets of a partnership, as they existed at the death of one of the partners, to be income which is to go to a life-tenant.

2. Nor is there any case holding that the whole of a decedent's interest in a partnership is not a part of the principal of his estate. There are exceptional cases, such as *Heighe v. Litig*, 63 Md. 301 (52 Am. Rep. 510); *Ibbotson v. Elam*, L. R. 1 Eq. 1881; but, beyond all controversy, such an interest is ordinarily principal. In all the exceptional cases the partnerships were, by their terms, to be continued irrespective of the death of a partner. No such provision exists in the present case. The death of Mr. Oliver dissolved the partnership, and no new business could thereafter be transacted. All that could be done was to sell the remaining assets and divide the proceeds, and the trustees of the partnership attempted to do nothing more. No profit, in the proper sense of the term, could be made, and any advance received upon sales of assets, is capital, not income.

3. All the assets existing at the death of the partner were capital, irrespective of whether more or less than their supposed value should be realized upon their subsequent sale. The argument of the learned judge, to show that the \$108,849 was earned since the death of the testator, is unsound and fallacious. The company did nothing to earn it. The discovery by others, while it was in a comatose state, of the existence of minerals in this land, cannot be called an earning by the company after his death. And the gains realized by this sale are not the same as ordinary partnership gains. This is a case out of the ordinary. The life-tenant is not entitled to any portion of the capital or assets of the partnership, or the proceeds thereof:

Arguments.

Kinmonth v. Brigham, 5 Allen 276; Lewin on Trusts, 304; Williams on Executors, 1393; Hill on Trustees, 591.

4. If the land company had been in active operation, buying and selling lands and paying dividends, at the date of the testator's death, it might be said that he intended such dividends to be considered as part of his estate, as in Reed v. Head, 88 Mass. 174, and Balch v. Hallet, 76 Mass. 402. But, in the circumstances of the present case, there can be no dividends, except dividends of capital. If the trustees of the company had undertaken to divide the land itself, the life-tenant would not have been given the fee in any portion of it, and yet the court has awarded her the proceeds of the sale of the fee. There is no magic in the words dividends, profits and income, and equity will disregard the form and grasp the substance of the transaction: Vinton's App., 99 Pa. 434; Eley's App., 103 Pa. 300; Earp's App., 28 Pa. 368; Moss's App., 83 Pa. 264.

5. There are gains of increment as well as gains of income or earnings: Bridge Co. v. Commonwealth, 117 Pa. 265. Income of a partnership association or corporation may be carried into capital account, and new stock, or its equivalent, may be issued therefor to the life-tenant; but increase in the value of assets belongs to the remainderman, especially when, as in this case, it arises from the discovery by strangers of unknown elements of value, and not from any efforts on the part of the management: Cook on Stocks and Stockholders, § 553; Perry on Trusts, § 545 and note; Hill on Trustees, 591; New England Trust Co. v. Eaton, 140 Mass. 532. The income or earnings which, under the Pennsylvania rule, belong to the life-tenant, must result from the employment of either capital or labor or both combined: Earp's App., 28 Pa. 368; Eley's App., 103 Pa. 300.

6. In this case, the fund was realized by a sale of part of the 600 acres of land of which the testator owned an undivided share. The proceeds of such a sale cannot go to the life-tenant: Cairns v. Chaubert, 9 Paige 160; Paris v. Paris, 10 Ves. 185; Howe v. Dartmouth, 7 Ves. 151; Hill on Trustees, 591; Perry on Trusts, § 545; Lewin on Trusts, *305; Cook on Stocks and Stockholders, § 554; Williams on Executors, 1393; Vinton's App., 99 Pa. 434; Heard v. Eldredge, 109 Mass. 258; Gifford v. Thompson, 115 Mass. 478; Van Doren

Arguments.

v. Olden, 19 N. J. 117. The life-tenant would not lose by any depreciation in the value of the principal, and neither can she gain an advantage by its appreciation, no matter how speculative and unreal the advance may be: Hubley's Est., 16 Phila. 327, affirmed by Supreme Court in January, 1884; Vinton's App., supra; New England Trust Co. v. Eaton, 140 Mass. 552; In re Gerry, 103 N. Y. 445; Cairns v. Chaubert, supra; Hill on Trustees, 591.

Mr. Richard C. Dale and *Mr. Henry C. Olmsted*, for the appellee:

1. The appellant's argument rests upon the proposition that the testator was the owner of an undivided portion of the land sold. The fallacy in the reasoning by which that proposition is sought to be supported, is that it overlooks the well-established distinction between ordinary partnerships and unincorporated joint-stock associations, with shares transferable at the pleasure of the shareholder. Such an association is not dissolved by the death of a shareholder: Lindley on Partnership, 244. The forty acres were owned, not by individuals, but by a company, organized for the purpose of buying and selling lands for profit. The legal title was vested in the trustees of the company; the equitable title was in the association as a unit, the individual shareholders having no estate, legal or equitable, in the lands as such, their interests being solely in the proceeds of the lands when divided as profits, with a right to the return of the capital invested, upon liquidation: *Kramer v. Arthurs*, 7 Pa. 165.

2. There is no real distinction between incorporated and unincorporated associations in this respect: *Andrews v. Schott*, 10 Pa. 50; *Morrow v. Brenizer*, 2 R. 188; *Allison v. Wilson*, 13 S. & R. 330; *Meily v. Wood*, 71 Pa. 488; *Zell's App.*, 126 Pa. 329. This case stands before the court in the same light as if the company had dealt in, and had sold, copper instead of land. It should require very clear affirmative evidence showing fraud in the declaration of this dividend as profits by the trustees, to overcome the effect of their action and justify the court in treating it as a division of capital in the guise of profits. There is not a scintilla of such evidence. It is argued, however, that the profit was earned in the testator's lifetime because the land was then owned by the company. But the

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profit on such a transaction is made when the sale takes place. Moreover, at the testator's death there was no reason to believe that the land was worth its cost, and all the increase in their market value has come since.

3. It is undisputed that the company retains money and land far in excess of its capital, and on the undisputed facts, under a well-settled line of authorities, the life-tenant is entitled to the dividend, as a profit accruing during her ownership: *Earp's App.*, 28 Pa. 368; *Wiltbank's App.*, 64 Pa. 256; *Thomson's Est.*, 11 W. N. 482; *Phil. Trust Co.'s App.*, 24 W. N. 137 (1 *Mona.* 230); *Bridge Co. v. Commonwealth*, 117 Pa. 265; *Barclay v. Wainewright*, 14 Ves. 66; *Browne v. Collins*, L. R. 12 Eq. 586; *Hyatt v. Allen*, 56 N. Y. 553 (15 *Am. Rep.* 449); *Perry on Trusts*, §§ 544, 545; *Reed v. Head*, 6 Allen 174; *Harvard College v. Amory*, 9 Pick. 446; *Balch v. Hallet*, 10 Gray 402; *Van Doren v. Olden*, 19 N. J. Eq. 176; *Lord v. Brooks*, 52 N. H. 72. In *Moss's App.*, 83 Pa. 264, and *Biddle's App.*, 99 Pa. 278, the transaction was substantially an increase of capital stock, without an increase of capital, producing a consequent impairment of the value of the original shares, and the stock dividends were held to be capital for that reason. *Vinton's App.*, 99 Pa. 434, is distinguishable from the present case, as substantially the entire capital was there distributed.

OPINION, MR. JUSTICE WILLIAMS:

The contest in this case is between the life-tenant and the remainderman, and the question is whether the fund in the hands of the trustees is income or principal. It appears that George L. Oliver was one of the persons who organized the Metalline Land Company of Lake Superior, and that he remained a member of the company until his death in 1886. This company was organized on the joint-stock plan, with a capital divided into twenty thousand shares having a nominal or face value of five dollars each. At the time of his death Oliver held five thousand five hundred and eighty-two shares. By his will he made some specific gifts, and placed the residue of his large estate in the hands of trustees with directions to pay the net income derived therefrom to his daughter, during her life, and the principal, after her decease, to the Merchants' Fund Association for certain charitable uses. The Metalline

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Land Company owned about six hundred acres of land when Oliver died, and two years later sold forty acres of it for a half million dollars. The larger part of this price has been divided by the company among its stockholders, and the dividend accruing to the Oliver stock is over one hundred thousand dollars. The daughter claims it as income; the appellant claims it as principal. To which of them should it be awarded?

Before determining this question it will be best to consider some preliminary ones that lead up naturally to it. These are, first, what is the legal status of the company? Second, what is the relation of the stockholders to the company? Third, what is the interest of a stockholder in the company property?

The company is unincorporated and is a partnership organized on the joint-stock plan by the contract entered into by its members. This contract designates and describes the business to be done, the capital to be used, and how it is to be paid in by the members, and limits the number of persons by whom the affairs of the company are to be conducted. It provides that the interest of each member, in the joint fund, is to be measured by his shares of stock, which he may sell and transfer without consultation with his associates and without impairing the power of the trustees or the existence of the company. The partnership thus formed, whatever the liability of its members to third persons may be, is an artificial juridical person capable of acquiring, holding, and selling property. Ordinarily, a partnership can convey its real estate only by the deed of all its members, but this company gave to its trustees power to buy, encumber, and sell land for it in their own names. It was a dealer in land as a commodity, using the names of its trustees in all its transactions. The principle that an unincorporated company or firm may deal in land, and that where it does so it holds the title, and may encumber or convey it, was settled in *Brady v. Colhoun*, 1 P. & W. 140. The relation of the stockholders to the company is also settled largely by the articles of agreement. They contribute the capital, select the trustees who are to use and invest it, and are entitled to a distributive share of the profits made in the business. As between themselves, however it may be as to others, they are liable for losses in proportion to their stock. They have, however, no power to use the name of the company, to interfere

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with its business, or to bind it in any manner. This power they have voluntarily surrendered, and have committed it to the trustees selected by them as the agents and representatives of the company; so that the firm or company speaks, not through its members as such, but through its trustees. These are liable for their fidelity to the trust, and for all profits made in the business, in substantially the same manner that a board of directors is liable to the stockholders in an incorporated company. In partnerships of the ordinary character, each partner is the agent of his firm, has personal contact with and control over its affairs, and the right to possession in common with his copartners of the firm property; but, under the agreement organizing the Metalline Land Company, the relation of the individual member to the firm was changed, and his rights reduced so that the stockholder had only a right to participate in the election of trustees, and to receive his share of the money made.

The interest of the stockholder in the company property is controlled by his relation to the company under his agreement and by the nature of the business done. The object in buying was not to mine or operate in any other manner, but to sell again so as to make gain by the purchase and sale of land, and the articles provided for the division of the profits made by such purchase and sale among the stockholders. The interest of each member was therefore an interest in the profits made. He had no title to the land bought by the trustees for the company, as a tenant in common or otherwise, and could neither convey nor encumber it. His interest in it was personal estate and the extent of that interest was shown by his certificates of stock: *Kramer v. Arthurs*, 7 Pa. 165; *Brady v. Colhoun*, supra. The company was the real owner of the land, and the trustees acting for it could alone encumber or convey it. The stockholder had, as a partner has, a resulting interest in the business and assets of the company, which can be legally ascertained only by an account: *Meily v. Wood*, 71 Pa. 488. The purchase of real estate by a firm or company dealing in it, is, as between itself and its members, a conversion of it into personalty, and the levy and sale of the land upon a judgment against an individual member of the firm passes no interest or estate in it to the purchaser. The creditor of one partner can acquire by levy and sale of his debtor's interest no greater right than his

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debtor held, viz., the right to an account and to a distributive share of what may remain after the payment of the firm debts on final settlement: *Ebbert's App.*, 70 Pa. 79; *West Hickory M. Ass'n v. Reed*, 80 Pa. 38; *Meily v. Wood*, 71 Pa. 488. The interest of Oliver as a stockholder in the land company was, therefore, not that of a tenant in common of its lands, but that of one entitled to share in the profits of its business. The trustees under his will succeed him as holders of his shares, and their interest as such holders is neither greater nor less than his interest was while he was living.

The company was not dissolved by Oliver's death, and has not yet been dissolved. It has done but little business for several years, but it has paid the taxes on its lands and kept up its own organization, and still holds undisposed of nearly six hundred acres in the names of its trustees. The relation between it and the holders of its stock is, therefore, the same since Oliver's death as before. He had no title to the lands of the company while he lived, and none could pass from him to the trustees under his will by reason of his death. His interest as a stockholder was personal estate in his hands, and it is personal estate now in the hands of his representatives. The dividend made by the company out of the proceeds of the forty acres has the same character, and is governed by the same rules as though it had been made in his lifetime. It represents part of the difference between the cost of the land sold, including taxes and expenses, and the price received for it. That difference is the profit made by means of the purchase and sale of the land, which it is the duty of the trustees to divide among the stockholders. It is clear, therefore, that this dividend is personal estate, and represents gain or profit made in the proper business of the land company, that of buying land for purposes of sale, and selling it with a view to make gain for the stockholders. The will directs the payment of the net income from his estate, real and personal, to his daughter, and as this dividend represents income, it goes to the daughter and not to the remainderman. The shares are part of the residuary estate and belong to appellant. The profit accruing from the sale of lands is income from the investment in the stock of the land company, and if made since the death of Oliver, is not to be distinguished from income derived from any other source.

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This leads us to the only other question, which is, When was the profit out of which this dividend is declared earned? It is urged that it has not been earned since Oliver's death, and that for that reason, admitting it to represent profits, it belongs to the remainderman under the rule in *Earp's App.*, 28 Pa. 368. The argument is that the phenomenal advance in the price of this piece of land is not due to anything done by the land company, by way of development or otherwise, but to the presence of a rich deposit of copper ore which was in place when Oliver died. For this reason, it is said, the real value of the land has not changed; nothing, therefore, has been gained by reason of anything done by the company.

The reply to this is that the object of forming the company was to buy lands in advance of any general knowledge of their mineral value, and, by means of openings or borings, develop their true value and then sell. Whether the work which demonstrated the existence of the deposit of copper on the forty acres was the work done by it or by its neighbors, is unimportant. The mineral value was made apparent in either case, and a sale at a greatly increased price made possible. The increased price came, not from a change in the actual value, but from a correct knowledge of that value which increased the market price. This knowledge was acquired, and the price advanced in consequence of it, after Oliver's death. When he died the stock was thought to be of little value, and the lands could not have been sold at a profit. There were, therefore, no accrued or undivided profits to pass to the remainderman, and the wonderful advance made since his death has been earned, within the meaning of the rule in *Earp's Appeal*, by means of developments made in the neighborhood since the title was vested in the trustees named in his will. *Earp's Appeal* is, therefore, in harmony with our holding in this case. The same is true of *Wiltbank's App.*, 64 Pa. 256, and *Moss's App.*, 83 Pa. 264. In the latter case, the question was over the character of the option to subscribe for new shares of stock, belonging to existing stockholders by virtue of their ownership; and this court held that the option did not represent profits earned, but the right of the holder to increase his investment with a view to enlarged operations and greater profits to be earned thereby in the future. It belonged, therefore, to the owner of the stock and not to the owner of the income.

Syllabus.

The circumstance that the entire block of shares in the land company was appraised at five dollars, is without significance. It is now clear that the shares are worth all that has been invested in them, and that the remainderman is many thousands of dollars better off than was supposed when the inventory was taken, but the net income is not his; that goes to the daughter.

The decree of the court below is affirmed, and the costs of this appeal are to be paid by the appellant.

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L. DE LA CUESTA v. INSURANCE CO. OF N. A.

T. E. HUFFINGTON v. INSURANCE CO. OF N. A.

F. H. CUNNINGHAM v. INSURANCE CO. OF N. A.

G. P. CUNNINGHAM, ADMR., v. INSURANCE CO. OF N. A.

CHARLOTTE HULME v. INSURANCE CO. OF N. A.

APPEALS BY PLAINTIFFS FROM THE COURTS OF COMMON PLEAS
Nos. 1, 2, OF PHILADELPHIA COUNTY.

WM. DAWSON, EXR., v. INSURANCE CO. OF N. A.

APPEAL BY DEFENDANT FROM THE COURT OF COMMON PLEAS
NO. 2 OF PHILADELPHIA COUNTY.

Argued January 22, 1889.

Re-argued January 13, 1890—Decided October 6, 1890.

[To be reported.]

(a) A stockholder of a corporation being about to make a written protest against the exaction from him of a bonus upon a subscription to a new issue of stock, the company's president requested him not to write it, agreeing that, under his verbal protest, he should have whatever benefit any one should receive, under a written protest, by any suit:

1. The effect of the president's agreement was simply a waiver of a written protest, putting the stockholder in the same position he would have occupied if he had written out his protest in a formal manner; it was not an engagement that the stockholder might recover back the bonus paid by him if any one else should obtain such a recovery.

Statement of Facts.

2. Money voluntarily paid cannot be recovered back simply because the payment was made under protest. The only effect of a protest is to show the involuntary character of a payment procured by duress, and the intent to claim the money back: Cunningham's App., 108 Pa. 546, explained and distinguished.
3. The coercion which will render a payment under protest involuntary, so that it may be recovered back, must consist of duress either of person or of goods. A mere denial of an incorporeal right, by which a man is placed in a "dilemma" and compelled to choose between conflicting views of the law, is not sufficient for that purpose.
4. A stockholder, who has the right, under the law, to subscribe at par for a proportionate part of a new issue of stock, has an adequate remedy in damages for a refusal by the corporation to recognize that right; and a threat to sell such stock to others, unless he agree to pay more than par for it, will not constitute legal duress: Motz v. Mitchell, 91 Pa. 114, distinguished.

No. 175 July Term 1888, Nos. 77, 109, 110, 111, 112 January Term 1889, Sup. Court.

DE LA CUESTA V. INSURANCE CO.

On June 22, 1885, Leandro De la Cuesta brought assumpsit in the Court of Common Pleas No. 1 against the President and Directors of the Insurance Company of North America, to recover back the sum of \$7,000, paid by the plaintiff to the defendant company under protest. Issue.

At the trial on April 30, 1888, the plaintiff made an offer embracing his whole case, and proposing to prove, in substance, the following facts:

The defendant company was incorporated by the act of April 14, 1794, L. B. No. 5, 205; and its charter was supplemented by the acts of January 28, 1813, P. L. 43; April 3, 1833, P. L. 118; October 11, 1839, P. L. (1840) 11; April 6, 1842, P. L. 247; May 8, 1850, P. L. 706; and March 14, 1871, P. L. 348. In July, 1876, the stockholders duly accepted the provisions of § 27, act of May 1, 1876, P. L. 60. In 1880, the capital stock being then \$2,000,000, of the par value of \$10 per share, the board of directors proposed to increase the capital of the company under § 27, act of May 1, 1876, and issued a call for a meeting of the stockholders on November 15, 1880, to consider such proposition. On the day named therefor a meeting of the stockholders was held, at which the following resolution was adopted:

Statement of Facts.

"Resolved; That the capital stock of this company be increased \$1,000,000, by the issue of one hundred thousand shares at par to the stockholders, in proportion of one share for each two shares held by them on the day they shall respectively subscribe for the same,—they subscribing an agreement to pay ten dollars per share for the stock, and also ten dollars per share for the privilege of subscribing, the proceeds of which privilege shall be added to the surplus fund of the company. Subscriptions will be received until, or on, the first day of February, 1881, at which time the right to subscribe shall cease, but no subscription will be received unless two dollars per share is paid at the time of subscribing; the balance of the subscription, eight dollars per share, will be payable on the first day of August, 1881, and the price of the privilege will be payable, five dollars on the first day of November, 1881, and five dollars on the fifteenth day of December, 1881, with the right to anticipate all payments; the failure to meet any one of these payments by the last day appointed will be deemed a surrender of the right to subscribe and of the amounts already paid. Certificates will not be issued for these shares until after the fourteenth day of January, 1882.

"At the time of subscribing, scrip receipts will be given, transferable as stock is transferred on the books of the company to purchasers, and these must be surrendered when certificates are issued.

"Interest at the rate of four per cent per annum will be allowed on all payments from the date of receipt, and paid on the next ensuing dividend day, to the registered holder of the scrip receipts, until the certificates are issuable.

"All shares not subscribed for on or before the first day of February, 1881, and those the price of which is not fully paid by the fifteenth day of December, 1881, will then be sold at public auction in this city, on thirty days' notice in the papers, for the benefit of the company, but at not less than twenty dollars per share.

"Out of the proceeds of any shares thus sold, the subscriptions of which have been forfeited, the amounts actually paid by the subscribers will be returned to the holders of the respective scrip receipts, but without interest."

The plaintiff was a stockholder holding 1400 shares. He,

Statement of Facts.

with Winthrop Cunningham & Sons and other stockholders, opposed the exaction of the bonus of \$10 per share as a condition of the subscription for the new stock, and with them employed an attorney to prevent that exaction. On January 28, 1881, the plaintiff, with one Keefe, went to the clerk's desk in the office of the company, and the clerk refused to take Mr. De la Cuesta's subscriptions without the bonus, when he took the pen and commenced to write, "This is paid under protest," and had formed part of the word "This;" and then Mr. Platt, the president of the company, standing beside them, said to Mr. De la Cuesta, "Don't write that protest; your verbal one is just as good, and you shall have whatever advantage any party or parties shall receive under a written protest;" and that he, Mr. Platt, would, as president of the company, for the company, guarantee that Mr. De la Cuesta should receive, under his verbal protest, any benefit any one should receive under a written protest by any suit; and in consequence of that Mr. De la Cuesta did not complete his written protest or have his name added as a party to a bill in equity which had been filed by Winthrop Cunningham & Sons and others, on behalf of the complainants and of all other stockholders who might in like right intervene, praying for a decree against the company, to restrain it from carrying out the scheme of issuing said stock subject to the exaction of the bonus of \$10 per share, but simply awaited the termination of the proceedings upon said bill. Repeatedly after his verbal protest, and during the progress of the Cunningham suit, Mr. De la Cuesta was requested by the directors of the defendant to withdraw his opposition and demand for his bonus, and unite with the stockholders consenting to the condition of bonus required, but always refused.

In the suit in equity of Cunningham et al. against the insurance company* the court on January 25, 1881, granted an injunction against the company, which, by subsequent order made the same day, was modified "so as to confine it to prohibiting the company dealing with the rights of the plaintiffs, or any of them, or otherwise interfering with those rights, until a further order of the court; and also prohibiting the defendants from taking any action which would deprive the plaintiffs of the right

*See Cunningham's App., 108 Pa. 547.

Statement of Facts.

to subscribe pending this suit either before or after February 1st, under protest, until the further order of this court." A final decree, in said case, was made by the Supreme Court on February 23, 1885, by which it was ordered that the company "allot to the appellants such an amount of the new stock shares as shall be their proportion under the act of the general assembly above recited, free from bonus or charges, and if they, or any of them, have, under protest, paid such bonus or charges for the said stock shares, that the same be refunded to them, with interest." The plaintiff then demanded the return of the bonus paid by him.

The offer of the plaintiff to prove the facts above stated was objected to by the defendant.

By the court: Objection sustained; exception.¹

—Thereupon the court, ALLISON, P. J., on motion of the defendant, entered a judgment of nonsuit; exception.² After argument, a motion to take off the nonsuit was dismissed; exception.³ The plaintiff then took the appeal to No. 175 July Term 1888, assigning for error:

1. The refusal of the plaintiff's offer.¹
2. The entry of the judgment of nonsuit.²
3. The refusal of the motion to take off the nonsuit.³

This appeal was argued on January 22, 1889, before PAXSON, C. J., STERRETT, CLARK, MCCOLLUM and MITCHELL, JJ., by *Mr. J. Warren Coulston* and *Mr. George M. Dallas* (with them *Mr. George L. Crawford*), for the appellant, and by *Mr. R. C. McMurtrie* and *Mr. John G. Johnson*, for the appellee.

DAWSON v. INSURANCE CO.

To No.—December Term 1885, in the Court of Common Pleas No. 2, William Dawson, executor of John Dawson deceased, brought assumpsit against the same defendant upon a similar cause of action. Issue.

At the trial, on May 16, 1888, the plaintiff presented testimony tending to prove that on January 31, 1881, the plaintiff's testator, who was a stockholder in the defendant company, subscribed for 250 shares of the new stock above mentioned, the subscription being made through the plaintiff who was then acting as the attorney in fact of John Dawson; that at the time of making the subscription and paying the first instal-

Charge of Court below.

ment upon it, the attorney in fact and his principal understood that the company had no right to exact the payment of the additional \$10 per share, and that if this was paid under protest it could be recovered back; and the representative of the company who received the subscription was informed by William Dawson that the right to exact the extra \$10 was disputed and that payment was made under protest, to save the right to the stock, and the words "under protest" were added to the subscription paper.

It was shown further, that on July 26, 1881, John Dawson took advantage of the option to anticipate the maturity of the instalments, and paid the balance of his subscription in full. The record of the Cunningham equity suit was put in evidence.

At the close of the testimony the court, HARE, P. J., charged the jury in part as follows:

The stockholders of the North American Insurance Company, an old and very much respected company in this city, resolved some seven or eight years ago that it would be advisable to increase their capital stock. Their stock consisted at the time, as I understand, of two hundred thousand shares, rated at ten dollars per share, making the nominal or par value of the shares \$2,000,000. By the resolution the stock was to be increased one half. That is to say, for every two shares one was to be issued. Those shares were to be issued as being of the par value of the stock of ten dollars per share; that amount to be paid by the persons who subscribed for it; the effect of which would be to add to the capital stock of the company \$1,000,000, with a view, I suppose, to the transaction of a profitable business. It seems, however, a majority of the stockholders, perhaps the large majority, were of the opinion that a still further increase of the assets of the company was advisable. They therefore desired that the right to subscribe for an additional one hundred thousand shares at ten dollars per share should be on condition that, in exercising it, whoever subscribed ten dollars for one of the new shares of the stock should also pay ten dollars for the privilege of being admitted to the new subscription.

The first condition, under the ruling of the Supreme Court,

Charge of Court below.

they were entitled to make, and the second condition was illegal. . . .

Under these circumstances, the new stock was issued and scrip was to be given for it, and any man who came forward and paid, as the payments fell due, at the rate of ten dollars for each share, and who after having made those payments continued to pay ten dollars for the privilege of buying a share and becoming a stockholder, would become entitled to his proportion of these new shares of stock. If, however, he did not comply with all these conditions, including the condition which required him to pay ten dollars for the privilege, he would forfeit his right to the new stock, and, moreover, that stock would be sold to the highest bidder and acquired by third persons, which would introduce a new element into the company.

This course reduced the plaintiff to a dilemma. If he did not comply with the illegal condition, the stock would be sold and new holders brought into the company. How much disadvantage that would cause I do not know. In some instances it might be very considerable. On the other hand, if he paid without protest he certainly could not get the money back, and it would be so much lost to him except that, going into the treasury of the company, he would be entitled to participate in it as a stockholder. Under these circumstances, the plaintiff paid the ten dollars which were necessary to buy the stock and the ten dollars which were necessary to entitle him to the privilege of buying, declaring that he did it under protest. These words are used customarily to convey the idea that the party is giving something that he does not owe, to some one who is not entitled to receive it, and that he does so against his will and under coercion. Such was the course that the plaintiff desired to pursue, but it is questionable whether he took the proper means to carry his purpose into effect.

When the last day for subscription was about to expire he signed the paper with the words "under protest" and paid two dollars per share for two hundred and fifty shares of stock and took a scrip receipt, subjoining "under protest." Had this been all, it would not have been a clear intimation of his purpose. I do not assert that it would not have been sufficient,

Charge of Court below.

because the company might have gathered what he intended, but I cannot say that without more it would have been an explicit explanation. But his son, Mr. William Dawson, who represented him at the time and now acts as his executor, declares that he stated, in paying the first instalment, "I said we paid under protest and did not think they had no right to demand the ten dollars bonus; we were obliged to pay these instalments because we could not otherwise get our stock." This occurred on January 31, 1881, and the payment of two dollars per share on the price of the stock took place on the same day, and the remaining instalments were to be paid successively; but on July 26th, the plaintiff paid the whole amount in advance, with a view, no doubt, to a discount of four per cent on what was not yet due. That is, he paid the entire price of the stock which was not all yet due, and also all that he was to pay for the privilege of becoming a purchaser, none of which had become due; and he did so without saying anything or making any protest, simply handing the money over to the company as in full.

The question for the jury is whether what passed on January 31st, was so much a part of the whole transaction that the protest then made was a protest against the subsequent payments, and whether the company understood or ought to have understood from what the plaintiff then said that whatever he might do in the same matter would be against his will, reserving the right to recover back whatever they had no legal right to demand.

The defendant's counsel ask me to charge you:

5. There can be no recovery in this form of action.

Answer: I decline that point.¹

6. The plaintiff's right, if he have any, after permitting his fellow-stockholders to frame and partially execute the scheme they did, is to an action for damages for not issuing stock to him at par.

Answer: I decline that point.²

7. He cannot, by resorting to this form of action, retain the benefit resulting from the compliance with the terms by his fellow-stockholders and reclaim the portion he contributed.

Answer: I decline that point.³

8. The plaintiff's right depends on there having been a protest by him at the time of the payment.

Statement of Facts.

Answer: I affirm that point with this qualification: At the time of payment, or at such a time in the course of the same transaction as would operate as a protest at the time of payment, subject to what I have said with regard to that already.⁴

9. If he did not protest at the time of payment, it is immaterial that he protested when he signed the contract or made the first payment on the ten dollars which was legally demanded.

Answer: I decline that point.⁵

10. The verdict on the evidence should be for the defendant.

Answer: I decline that point.⁶

—The jury returned a verdict for the plaintiff for \$2,500. A rule for a new trial having been discharged, judgment was entered upon the verdict; thereupon, the defendant took the appeal to No. 77 January Term 1889, assigning for error:

1-6. The answers to the defendant's points.^{1 to 6}

This appeal was argued January 30, 1889, before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ., by *Mr. R. C. McMurtrie* and *Mr. John G. Johnson*, for the appellant, and by *Mr. George Tucker Biapham* (with him *Mr. William Henry Lex*), for the appellee.

HUFFINGTON (AND OTHERS) v. INSURANCE CO.

To June Term 1885, in the Court of Common Pleas No. 2, four actions against the same defendant were brought by Winthrop Cunningham & Sons, Fanny H. Cunningham, G. P. Cunningham, administrator of Winthrop Cunningham, deceased, and Charlotte Hulme, respectively. Before trial, the first of these suits was marked for the use of Thomas E. Huffington, assignee for the benefit of creditors of the plaintiff firm. These four cases raised substantially the same question as the De la Cuesta and Dawson cases. An additional question was raised by the action of Winthrop Cunningham & Sons, which was brought to recover back the bonus paid by the plaintiff upon certain shares not embraced in the equity suit reported in 108 Pa. 557. Certain shares of the old stock held by Cunningham & Sons had been transferred by them to other parties as collateral security for advances of money, and were standing in the names of the transferees at the time the subscriptions for new stock were taken by the company. The

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subscriptions which the owners of the pledged stock were entitled to make, were made in the names of the persons who were holding it as collateral security, but the subscriptions were paid with the money of Winthrop Cunningham & Sons.

The court, MITCHELL, J., refused to permit the plaintiff to show that the firm of Cunningham & Sons were the real owners of the old stock and the real subscribers to the new stock involved in this action, and at the close of the testimony for the plaintiff in each of these four cases, entered judgment of nonsuit. Rules to show cause why the nonsuits granted should not be taken off were afterwards discharged, whereupon the plaintiffs took the respective appeals at Nos. 109, 110, 111, 112 January Term 1889, filing specifications of error complaining of those rulings.

These appeals were argued together on March 28, 1889, before PAXSON, C. J., STERRETT, CLARK, MCCOLLUM and MITCHELL, JJ., by *Mr. William Henry Lex* and *Mr. George Tucker Bispham*, for the appellants, and by *Mr. R. C. McMurtrie* and *Mr. John G. Johnson*, for the appellee.

On May 6, 1889, the Supreme Court ordered a re-argument in No. 175 July Term 1888, *De la Cuesta v. Insurance Co.*, and on January 13, 1890, it was again argued before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

Mr. George Tucker Bispham and *Mr. George M. Dallas*, for the appellant:

The question for this court is whether the testimony offered would, if admitted, have supported a verdict for the plaintiff. It would have established all the averments, not peculiar to the plaintiffs in that bill, upon which the decree of this court in *Cunningham's App.*, 108 Pa. 557, was rested, and the decision in that case conclusively supports the general position upon which the present action is based. It determined, not only that the stockholders were entitled to a pro rata allotment of the new stock clear of bonus, but also that any of the plaintiffs in that suit who had paid the bonus under protest, were entitled to have it refunded with interest. Our claim for a return of the bonus paid by us under protest, is resisted upon the

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ground that the payment was voluntary. To this defence we reply :

1. The payment of bonus by the plaintiff was of such a nature and made in such circumstances as to entitle him to a return thereof, independent of the matters we shall refer to subsequently. This point is ruled by Cunningham's Appeal, *supra*. There is nothing in the report of that case indicating that the decree was based upon circumstances peculiar to it and not existing in the present case. Nor did the modified injunction in that case give to the protest of the plaintiffs therein any peculiar potency or effectiveness, or bring the case under the doctrine of *Shaw v. Allegheny*, 115 Pa. 46, which differed from it essentially. The decision in Cunningham's Appeal, respecting the right to a return of the bonus, was not based upon any equity peculiar to the plaintiffs in that particular case, but upon a common-law right, pertaining alike to all who had paid under protest. The conclusion there reached is in harmony with the other Pennsylvania authorities: *Motz v. Mitchell*, 91 Pa. 117. *Union Ins. Co. v. Allegheny*, 101 Pa. 251, and *Peebles v. Pittsburgh*, 101 Pa. 304, which, as the opinion in *Shaw v. Allegheny*, 115 Pa. 46, shows, went to the extreme verge, are distinguishable on the ground that they related to levies upon lands.

2. The general doctrine as to payments not voluntarily made, is illustrated by the following cases: *Parker v. Railway Co.*, 6 Exch. 702 (49 E. C. L. 253); *Sutton v. Railroad Co.*, 4 Eng. & I. App. 249; *Parker v. Railroad Co.*, 7 M. & G. 292; *Wakefield v. Newbon*, 6 Q. B. 275; *Ashmole v. Wainwright*, 2 Q. B. 827; *Hospital v. Philadelphia Co.*, 24 Pa. 229; *Cobb v. Charter*, 32 Conn. 365 (87 Am. Dec. 178); *Baker v. City*, 11 Ohio 534; *Lehigh C. & Nav. Co. v. Brown*, 100 Pa. 358; *White v. Heylman*, 34 Pa. 142; *Lawrence v. Philadelphia*, 14 W. N. 421; *Amer. Steamship Co. v. Young*, 89 Pa. 187; *McCrickart v. Pittsburgh*, 88 Pa. 133. However, neither Cunningham's Appeal nor the present case depends upon the doctrine of duress; they are entirely outside of that doctrine. We are stockholders dealing with our agents, the managers of our company. The company stands toward us in a fiduciary relation. How can the defence that the money was voluntarily paid, possibly avail a trustee, as against his cestui que trust, in a chancery

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proceeding? And this action for money had and received is, in substance, a bill in equity. The effect given to the protest in Cunningham's Appeal was not referable to compulsion, but was expressly put upon the ground of non-acquiescence in the scheme under which the payments were demanded.

3. Not only was the payment of the bonus by the plaintiff made under protest, but the protest as made was accepted as a sufficient reservation of his rights, and as securing to him a return of the money if the demand for it was unwarranted. Having, through its president, given the plaintiff reason to rely upon his protest as effectual, and having claimed the benefit of the president's act in receiving the money paid on the strength of this reliance, the defendant is estopped from disputing the plaintiff's right to have his money returned: 2 Herman on Estoppel, §§ 733, 735; Ackla v. Ackla, 6 Pa. 228; Mercer M. & M. Co. v. McKee, 77 Pa. 170; Bidwell v. Pittsburgh, 85 Pa. 418; Montgomery v. Heilman, 96 Pa. 44; Spring St., 112 Pa. 258; Jones v. Building Ass'n, 94 Pa. 215. Again; the express agreement, under which the plaintiff paid the bonus, was that if he would abstain from making a written protest, he should be accorded any benefit which any other stockholder might obtain by suit. Hence, as the plaintiffs in the Cunningham suit thereby obtained a return of the bonus paid by them, this plaintiff is entitled to a similar benefit. His right to subscribe for shares was not based upon contract, but upon a statute, and his repudiation of a condition, wrongfully attempted to be coupled with the exercise of the statutory power, gave him the right to receive the shares at par.

Mr. R. C. McMurtrie and *Mr. John G. Johnson*, for the appellee:

1. We do not dispute, upon this record, that the president made the uncompleted protest perfect for the purpose of the case. He doubtless had power to waive a written protest and agree that a verbal one should be its equivalent; but he had no inherent power to do more than that, and his words cannot be tortured into anything more than an agreement that De la Cuesta should receive, under his verbal protest, the same benefit which any one else might recover by virtue of a written protest. The Cunninghams did not recover on their bill by virtue of their

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protest; their recovery depended upon facts and rights existing at the date of filing their bill, and the protest by them after bill filed, neither enlarged nor diminished their rights. Cunningham's Appeal does not decide the right of the plaintiff to recover in this case. In making the final decree therein, the effect of the conduct of the parties *pendente lite* was in the mind of the court, and the decree was necessarily confined to the rights of the litigants. Moreover, it seems to have escaped attention that no question as to paying under protest arose in that case.

2. The real question, here, is whether a payment made under protest can be recovered back, and the only point raised by the case is this: Was the remedy which the plaintiff elected to pursue the proper one? The plaintiff's right, under the company's charter, to have certain shares allotted to him at par, differed in no respect from a right to have so many shares delivered to him under a contract to sell. He had two remedies open to him. One would be to buy shares in the market, after a refusal of the company to deliver him shares at par, and then sue for what he would have to pay in the market beyond the par value. The other would be to tender par, and sue for the refusal to deliver the shares. The remedies exclude all others in the case of a claim to stock that can be purchased on the market: *Fry on Spec. Performance*, 11; *Angell & Ames on Corp.*, § 381. The exceptional remedy of paying under protest and then suing to recover back the money paid, is allowed only when the payment has been coerced by duress. Injustice, even though it amount to actual fraud, does not warrant it: *Moses v. Macferlan*, 2 Burr. 1009.

3. Even when payment has been coerced by duress of goods, the exceptional remedy is excluded whenever there is a form of action that enables the owner to get back his goods without actual payment: *Gulliver v. Cozzins*, 1 C. B. 799. To render a payment involuntary, there must be an actual, present, and potential compulsion: *Harvey v. Girard N. Bank*, 119 Pa. 212; *Harrison v. Waln*, 9 S. & R. 319; *Union Ins. Co. v. Allegheny*, 101 Pa. 250; *Peebles v. Pittsburgh*, 101 Pa. 304; *Lehman v. Shackelford*, 50 Ala. 437; *Harman v. Hannon*, 61 Me. 227; *Swanston v. Iiams*, 63 Ill. 165; *Elston v. Chicago*, 40 Ill. 514 (89 Am. Dec. 361); *Mayor v. Gill*, 4 Gill 425; *Awalt v. Eutaw*,

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34 Md. 435; *Ocean Steamship Co. v. Tappan*, 16 Blatch. 296; *Detroit v. Martin*, 34 Mich. 170 (22 Am. Rep. 512); *Sheldon v. Sch. Dist.*, 24 Conn. 88; *Lamborn v. Dickinson Co.*, 7 Otto 181; *Lackey v. Mercer Co.*, 9 Pa. 318. But the refusal to recognize a right, such as the plaintiff here had, is not duress within the meaning of the law: *Silliman v. United States*, 101 U. S. 465; *Davis v. Bank*, 2 Bing. 393. A protest is of no force except to make apparent that the payment is not voluntary, and that the duress by which it is compelled is not waived: *Marriott v. Hampton*, 2 Sm. L. C. 456. That a contract executed six months before the payment, would constitute duress is absurd: *Wilson v. Ray*, 10 Ad. & E. 82.

4. The plaintiff's right to demand that shares be issued to him at par, is not decided in *Cunningham's Appeal*. By the bill, in that case, *Cunningham* put the company to an election either to abandon its scheme, or, if it went on, to issue shares to him at par. *De la Cuesta* did not put the company to such an election. He entered into a contract for shares, and he could obtain them only on the terms of that contract. Even in cases of fraud, the purchaser of property cannot get it for less than he agreed to pay: *Great Luxemburg v. Magney*, 25 Beav. 586; *Evans v. Borie*, 1 W. N. 127; *Adywell Mining Co. v. Brookes*, 35 Ch. Div. 400; *Driscoll v. Bromley*, 1 Jur. 238. There was no other pressure that induced the plaintiff to make the payment than the dilemma which arose from uncertainty as to the law of the case. A prospect or a threat of a lawsuit does not render a payment involuntary: *Hospital v. Philadelphia Co.*, 24 Pa. 229. There was no threat to sell the plaintiff's right to any shares if he did not pay, and the company could not have done so. If he had a right to receive shares on payment of ten dollars, nothing that the company could do would divest that right.

DE LA CUESTA v. INSURANCE CO.

OPINION, Mr. CHIEF JUSTICE PAXSON:

I do not understand that there is any dispute as to what took place at the office of the defendant company on January 28, 1881, when the plaintiff called there to pay the subscription to the new stock. The following account of what then occurred is taken from the plaintiff's offer of proof:

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"That Mr. De la Cuesta, January 28, 1881, went with Mr. Keefe to the clerk's desk in the office of the company, and the clerk refused to take Mr. De la Cuesta's subscription without the bonus, when he took the pen and commenced to write, 'this is paid under protest,' and had formed part of the word 'this,' and then Mr. Platt, the president of the company, standing beside them, said to Mr. De la Cuesta: 'Don't write that protest; your verbal one is just as good, and you shall have whatever advantage any party or parties shall receive under a written protest;' and that he, Mr. Platt, would, as president of the company, for the company, guarantee that Mr. De la Cuesta should receive, under his verbal protest, any benefit any one should receive under a written protest by any suit; and in consequence of that Mr. De la Cuesta did not complete his written protest, or have his name added to Cunningham's bill, but waited the termination of those proceedings and then demanded the return of his bonus."

The effect of these facts, thus stated by the plaintiff himself, is to place him in the precise position he would have occupied had no conversation occurred between Mr. Platt and himself, and he had gone on and completed his written protest. The defendant company does not deny the facts as stated by plaintiff, nor seek to avoid the legal effect thereof. There was nothing in the transaction but a waiver of protest; that is to say, the protest was to be as effectual as if it had been written out in the most formal manner. It furnishes no evidence of a contract between the plaintiff and the corporation that, as a consideration for the plaintiff not putting his protest in writing, he should be entitled to recover, if any one, in any suit, past, present, or to come, should be capable of recovering. On the contrary, he was to have the advantage only of what any other person should receive in any suit by virtue of a written protest. There was no consideration for anything else. The company did not receive the bonus because of the waiver. The plaintiff went to the office for the purpose of paying the money, and would have paid it under a written protest had not Mr. Platt, as an act of courtesy, merely, accepted the verbal waiver. In this connection, I am unable to see what Cunningham's App., 108 Pa. 546, has to do with the case. There was no question of the effect of a protest in that case; it was

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not alleged that the decree was obtained on any such ground. The bill was filed to restrain the scheme proposed by the company, or to limit the new stock to ten dollars per share, its par value; to compel the company to issue the stock to complainants upon the payment of ten dollars per share, and to restrain it from selling the allotments to which the plaintiffs were entitled. This left the company an option. They could advance or recede. As they had gone on to a large extent, upon terms offered and accepted by nearly all the stockholders, this bill did not interfere with the scheme further than was necessary to sustain the right of the particular claimants therein to have their shares of the new stock issued to them at par, if the company concluded to issue the shares. The present plaintiff gives the company no option, but is seeking the same advantage as though he had put the company to an election; that is to say, by protesting under the contract, or against being required to contract, he can obtain the right under the contract without being bound to comply with its terms.

Undue importance has been attached to the following language in the decree in Cunningham's Appeal: "And if they or any of them have, under protest, paid such bonus or charges for the said stock shares, that the same be refunded to them, with interest." This must be understood to apply only to the litigants in that case. This court did not intend to decide the rights of parties not before it, who were not and could not have been heard. It has never, since its foundation, attempted to exercise such an arbitrary power. Moreover, there was neither protest nor payment in that case; there was nothing, therefore, to which the language referred to could apply, and the expression was doubtless used inadvertently. The decree is broader than the case.

The only important question presented by this record is the legal effect of payment under protest. The plaintiff was entitled, under Cunningham's Appeal, *supra*, to subscribe for the new stock at par. The company required him to agree to pay an additional sum at a future time for the privilege of subscribing. This bonus, as it was called, was to be added to the surplus fund. This, however, is not material. He signed the contract to pay the additional sum, under protest, and paid under protest. This suit was brought to recover back the money thus demanded. This is the whole case.

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It will be observed there was nothing to interfere with the plaintiff's right to stock which he already held. It was a contract for the delivery, not of his proportion of the new stock, but of the certificates or evidence of his ownership of such stock. The stock was already his, and no action of the company could deprive him of it. He could have tendered the par of the stock and demanded a certificate. If the company had refused to issue it, he could have brought suit and recovered its market value. If he wanted the shares, he could have bought them in the market and recovered from the company what he paid in excess of par. One share of the stock of a business or trading corporation is the precise equivalent of every other share; hence it is that equity does not concern itself about particular shares, and a bill will not lie to compel specific performance for the sale of specific shares: Foll's App., 91 Pa. 434.

There is no principle of law better settled than that money voluntarily paid with a knowledge of the facts cannot be recovered back. It is unnecessary, in referring to a settled rule of law, always to state the reasons of the rule in a judicial opinion. It is sufficient to say here that I know of no legal principle which is sustained by better reasons of public policy. If, in every instance, in which a man is in doubt as to which is the safe course to pursue, he can pay under protest, and then sue to recover it back, it is difficult to see where litigation is to end. The law, therefore, wisely holds that a voluntary payment cannot be recovered back. In the recent case of *Harvey v. Girard N. Bank*, 119 Pa. 212, the law is thus stated: "A voluntary payment of money under a claim of right cannot in general be recovered back. There must be compulsion, actual, present, and potential, in inducing the payment by force of process available for instant seizure of person or property, when the party so paying must give notice of the illegality of the demand, and of his involuntary payment. The element of coercion being essential, a mere protest or notice will not change the character of the payment, or confer of itself a right of recovery;" citing *Peebles v. Pittsburgh*, 101 Pa. 304. In *Harvey v. the Bank* there was a loss of credit, a very serious matter to a business man, by permitting a draft to go to protest. The party paid to protect his commercial honor, but we said it was not duress. In *Neely's App.*, 124 Pa. 406, there was an attempt to set aside an ante-

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nuptial contract on the ground of duress. After the marriage day had been fixed, the guests invited, and the caterer engaged, the husband produced an ante-nuptial contract which he required his intended wife to sign. She protested by her tears; his reply was, "No contract, no wedding." We held there was no duress. Many other cases of a like nature could be cited were it necessary. Those above mentioned are referred to as showing that mere embarrassment, or loss of credit, as in the bank case, or mortification, as in the Neely case, do not amount to the kind of duress which the law recognizes as justifying a payment under protest. And just here it is proper to remark that the only effect of a protest, in a case in which it may be legitimately applied, is to show that the payment was not voluntarily made, and that the party protesting intends to claim it back.

The law in regard to voluntary payments was well and concisely stated by Chief Justice LEWIS in *Hospital v. Philadelphia Co.*, 24 Pa. 229: "A voluntary payment of money under a claim of right cannot, in general, be recovered back; but it has been held that when a party is compelled by duress of his person or goods to pay money for which he is not liable, it is not voluntary, but compulsory; and he may rescue himself from such duress by payment of the money, and afterwards, on proof of the fact, recover it back: *Astley v. Reynolds*, 2 Str. 916; 12 Pick. 13. But the threat of a distress for rent is not such duress, because the party may replevy the goods distrained, and try the question of liability at law: *Knibbs v. Hall*, 1 Esp. Rep. 84. The threat of legal process is not such duress, for the party may plead and make proof, and show that he is not liable. *Brown v. McKinally*, 1 Esp. Rep. 279. But the warrant to a collector under a statute for the collection of taxes, is in the nature of an execution running against the person and property of the party, upon which he has no day in court, no opportunity to plead and offer proof and have a judicial decision of the question of his liability. Where, therefore, a party not liable to taxation is called on peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress, and not voluntarily, and maintain an action to recover it back;" citing 17 Mass. 461; 12 Pick. 13. We

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have here, succinctly stated, the principle upon which the doctrine rests in its application to a warrant for the collection of taxes. If the demand is illegal, and the party can save himself and his property in no other way, he may pay under protest and recover it back. But if other means are open to him by which he may prevent the sale of his property; if a day in court is accorded to him, he must resort to such means. Thus, the seizure of a man's goods under a landlord's warrant for rent that is not due, or for more than is due, would seem to be duress as much as the seizure of property for taxes; yet, if the unlawful demand for rent be paid under protest, it cannot be recovered back for the reason above stated, that the tenant can replevy the goods, and try the issue of no rent in arrear before a jury.

In *Taylor v. Board of Health*, 31 Pa. 73, it was held that a payment of taxes imposed by an act of assembly which was afterwards held to be unconstitutional, was not compulsory because made under a threat, express or implied, that the legal remedies to collect it would be resorted to. In *McCrickart v. Pittsburgh*, 88 Pa. 133, it was ruled that where a party would recover back taxes he is under no legal obligation to pay, he must protest, or give notice of his intention to reclaim them. *Motz v. Mitchell*, 91 Pa. 114, much relied upon by the plaintiff, was the case of an unrecorded deed for certain real estate which the party having obtained the possession of, used for extorting money from the owner of the premises. The destruction of the deed, in such case, might be the loss of title, and a suit brought to recover it might not avail as it would not necessarily prevent its destruction. This case came fairly within the doctrine of *White v. Heylman*, 34 Pa. 142, where a promissory note was given by a principal to his fraudulent agent to secure certain rights to which he was entitled, and out of which he had been defrauded by the agent, and it was held that in a suit by the equitable transferee of the note, the equities between the original parties could have been inquired into. *Union Ins. Co. v. Allegheny*, 101 Pa. 250, was the case of the payment of executions issued to sell lands for taxes, where the lien of the taxes had previously been discharged by a sheriff's sale; held, that the payment was voluntary. Two reasons were given. One was that the execution could not take from

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the company the possession of the land, and the other was that there might have been an application to a court of equity before the sale. It was said by Mr. Justice MERCUR: "No immediate and urgent necessity existed for the payment of the taxes to protect the property of the plaintiffs. Its goods were not about to be seized." In *Peebles v. Pittsburgh*, there was a street assessment against plaintiffs' real estate, under an act of assembly which this court subsequently held to be unconstitutional. The plaintiff paid his assessment under protest after notice that a scire facias would be issued to collect it; held, (a) that his payments, having been voluntary, could not be recovered back, and (b) that his notice and protest at the time of his payments gave him no higher right.

In *Shaw v. Allegheny*, 115 Pa. 46, it was held that a tax-payer who has invoked the aid of a court of equity in vain to restrain the collection of a tax by a sheriff's sale of the real estate taxed, the lien of which has been divested by a prior sheriff's sale, does not become a volunteer in the payment of said tax. It was said by Mr. Justice STERRETT, in delivering the opinion of the court: "Plaintiff's property having been levied on and advertised by the sheriff, he appealed to the equity side of the court for relief, but it was denied, and he was thus compelled either to submit to a sale of his property, by which his title thereto might be imperiled, or pay the taxes and costs. On the eve of the sale, he chose the latter alternative, and paid the city's unjust demand under protest. In a legal sense was this a voluntary payment? We think not. In *Union Ins. Co. v. Allegheny*, 101 Pa. 250, it was said of the insurance company, which was similarly circumstanced, except that it did not apply to the court for redress, that 'by application to the equitable powers of the court, or by bill in equity, execution might have been stayed, and the claim removed from the record.' That is just what plaintiff in this case endeavored to do, but without success; and therein is the distinction between that case and this. Relief in the form suggested in that case was asked, but it was refused, as we think erroneously; and plaintiff was compelled to choose one of the two alternatives above mentioned. If there is anything against which equity should relieve, it is an act of injustice and oppression, such as the city was proceeding to commit by exposing plaintiff's property to

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sale on liens which had been previously divested by sheriff's sale."

It would exceed the reasonable limits of a judicial opinion, and serve no useful purpose, were I to attempt to review the vast mass of authorities cited upon either side. Nor is it necessary to go outside of our own state for authority. We have abundant cases of our own which rule the question.

Applying the law as we find it to the facts of this case we are of opinion there was no duress. It is a duress either of person or goods that constitutes the coercion. It is not pretended there was a duress of person, nor was there anything to show duress of goods. There was nothing but the denial of a right, and a declared intention not to recognize a right is not duress. It is true, the denial of the right placed the plaintiff in a "dilemma," to use the expression of Judge Hare in Dawson's case. But if we adopt the principle that whenever a man is placed in a position in which the law is doubtful, and he is compelled to choose between two paths, in other words, to decide between conflicting views of the law, he is to be considered as under duress, we shall certainly multiply litigation, even if no other end is accomplished.

It is fair to test this question by supposing the company to have done what it is alleged they threatened to do. Suppose the plaintiff had tendered the company the par of the new shares to which he claims he was entitled; that the company had declined to accept it, and had sold the right to subscribe for a corresponding number of shares. How would this have affected the rights of the plaintiff? The company could no more have sold his stock than they could have sold his house. If he had a right to certain shares by paying ten dollars each therefor, that right could not have been divested by a sale of them by the company, nor by any other action on its part. His rights as a stockholder were fixed by the law: a certificate would have added nothing to them; it would have been evidence, nothing more, that he owned stock, but that already appeared upon the books of the company. The duress, if any, was not of a thing, of goods or chattels, but of an incorporeal right. Had the stock been sold he would have had no contest with the purchaser, as he would have necessarily had if a corporeal thing, or the title to a corporeal thing, had been sold

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accompanied by delivery of possession. He had to do only with the company; and, after tender of the par, could have brought his suit and recovered, as before stated, the market value of the stock, and if he wanted shares, with the money thus recovered could have bought a corresponding amount of other shares.

It was urged, however, that this case is upon all fours with *Motz v. Mitchell*, supra, where there was duress of an unrecorded deed, while in the case in hand there was duress of stock. This argument involves the assumption that a certificate had been issued for the new shares, which certificate the company unlawfully withheld from the plaintiff. In point of fact, the plaintiff never had a certificate for the new shares, for none had been issued. The plaintiff had a right to demand a certificate for them upon payment of the par, and to sue them for a refusal, as before stated. That there could not be duress of this right is too plain for argument. There was not duress of person or goods: there was simply the denial of a right; a refusal to issue shares of stock to which the plaintiff was entitled, and for which refusal he had a full, complete, and convenient remedy at law. We may concede that the action of the company placed him in a "dilemma;" he had to choose between two roads, neither of which he may have regarded as safe. In other words, he was uncertain as to his legal rights under the scheme proposed by the company. The "dilemma" was the uncertainty of the law. There was no other pressure or duress that caused the payment. However great the uncertainty of the law may be in particular cases, it has never been supposed to amount to duress of either person or goods. It was nothing more than is experienced by every lawyer in the course of his practice. He is often called upon to advise, where the law is uncertain; and, in all such cases, the client must take the risk.

We attach little importance to the suggestion that the company was acting in a fiduciary capacity. This was a matter really between the stockholders, and they were evidently dealing at arms' length. The corporate organization was the means by which their scheme was carried through.

Fortunately, the plaintiff suffers no injury by the affirmance of this judgment. He receives his proportion of the new shares at the same price at which they were issued to the other

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stockholders. It is true he does not get shares at ten dollars for which others paid twenty, but his equity in this respect is not strong.

We find no error in this record.

Judgment affirmed.

Mr. Justice STERRETT and Mr. Justice CLARK dissented.

DAWSON v. INSURANCE CO.

OPINION, MR. CHIEF JUSTICE PAXSON:

This case is ruled by *De la Cuesta v. Insurance Company of North America*. It is unnecessary to add anything to what was said in that case.

Judgment reversed.

HUFFINGTON v. INSURANCE CO.

OPINION, MR. CHIEF JUSTICE PAXSON:

This case is ruled by *De la Cuesta v. Insurance Company of North America*, just decided. The first three assignments of error present a question which was not involved in that case; but in the view we take of it they are unimportant, and do not require comment.

Judgment affirmed.

CUNNINGHAMS AND HULME v. INSURANCE CO.

OPINION, MR. CHIEF JUSTICE PAXSON:

These cases are ruled by *De la Cuesta v. Insurance Company of North America*, just decided. In each of them the

Judgment is affirmed.

136 84
141 359,

J. H. SANDFORD v. HESTONVILLE ETC. R. CO.

APPEAL BY DEFENDANT FROM THE COURT OF COMMON PLEAS
NO. 4 OF PHILADELPHIA COUNTY.

Argued January 10, 1890—Decided October 6, 1890.

1. It is not of itself negligence, either on the part of the passenger or on the part of a street-railway company, that an adult, or a person reasonably competent to take care of himself, should occupy by permission a

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platform of a crowded passenger car: *West Phila. etc. Ry. Co. v. Gallagher*, 108 Pa. 524.

2. The carrier, however, is bound to higher care and vigilance, when the platform is crowded, in proportion as that place is more dangerous than a seat inside the car; and, in case of injury, this fact, with all the circumstances, will be considered in determining the carrier's responsibility: *Crissey v. Railway Co.*, 75 Pa. 83.
3. In the case of a passenger, obviously incompetent, from extreme youth or other cause, to exercise proper judgment or discretion for his own safety, it is the conductor's duty to exercise the highest degree of vigilance for the passenger's safety consistent with the discharge of his ordinary duties: *Pittsb. etc. Ry. Co. v. Caldwell*, 74 Pa. 421; *Phila. etc. Ry. Co. v. Hassard*, 75 Pa. 367.
4. Where a boy of eight years, without the knowledge of the conductor, pushed through a crowded car to the front platform, where he was found by the conductor, when taking up fares, and was immediately thereafter injured without fault on the part of the company's employees, it was error to submit the question of defendant company's negligence to the jury.
5. Although a plaintiff in a cause may not be absolutely concluded by his own testimony as a witness, yet, when he has testified in a circumstantial manner as to a fact peculiarly within his knowledge, and which, if believed, would prevent his recovery, his testimony should not be ignored on the ground that he may have been mistaken.

Before STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 440 January Term 1889, Sup. Ct.; court below, No. 524 December Term 1887, C. P. No. 4.

To the number and term of the court below, John H. Sandford, a minor, by his next friend and father, John Sandford, brought trespass against the Hestonville, Mantua and Fairmount Passenger Railroad Company, filing a statement of claim averring that on October 23, 1887, the plaintiff, about eight years of age, "was a passenger on a car of defendant company; that said car was running along Lancaster Avenue, near Forty-first street; that the defendant, through its agent, the conductor, carelessly and negligently placed and permitted him to remain in a dangerous position upon the front platform and step of the car; that defendants illegally and improperly demanded fare, although it had been paid, and in so rough, abusive and harsh and improper manner, that plaintiff became frightened and was put in fear of bodily injury; that by reason of

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the dangerous position in which he was placed, plaintiff fell and was thrown off from the car and underneath the wheels; that his arm was injured and crushed, and in consequence was amputated." Issue.

At the trial on February 15, 1889, it was made to appear that on the date named in the statement, the plaintiff and a companion named McCoy got into a one-horse car operated by defendant company on Lancaster Avenue. They paid their fares to the driver of this car, there being no conductor, and rode with him to the defendant's station at Forty-third street, where they were told to get upon the two-horse car of the same company, to continue towards their homes at Thirty-seventh and Wallace streets. The driver of the one-horse car was asked for transfers, but did not give them. They boarded the defendant's two-horse car, but whether they got upon it at the rear platform or at the front platform, the testimony, at least as to young Sanford, was conflicting. There was testimony upon the part of the defendant that the plaintiff got upon the rear platform and went inside the car. Witnesses called on the part of the plaintiff testified that the boys got on at the front platform. The plaintiff himself, however, testified that he entered by way of the rear platform, and was ordered by the conductor to go up front; that the car was crowded and, going to the front, he went out upon the front platform. After the car had started from the station, the conductor went through the car collecting fares and found the plaintiff and McCoy on the front platform. In the presence and hearing of the plaintiff the conductor asked a fare from McCoy, who said they had paid their fares on the other car. The conductor said that that was an "old guy; he was trying to steal a ride," and must pay or get off. The plaintiff, as was claimed, was frightened, and passed upon the steps of the platform, as though to get off backward, holding by the railing. The driver pulled or pushed him back upon the platform. The plaintiff a second time attempted to get off when he either fell off or jumped, and was thrown under the car and injured.

At the close of the testimony, the court, WILLSON, J., charged the jury:

Ordinarily, what ought to be expected of a boy of eight years

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of age? [Judging from what you have seen of him, what ought to have been expected of this boy at that time; and judging from his appearance, his size and his intelligence, as you have observed those characteristics, what ought to have been the judgment of the persons in charge of the car, with reference to the boy's capacity to take care of himself?]¹ This inquiry is pertinent, because the duty of a defendant like this railway corporation, which, for the practical purposes of the case, is nothing more than the duty of the persons in charge of the car, varies according to circumstances.

The duty of a conductor or driver of a car toward a young child, a very young child, one obviously incapable of directing its own movements with safety, or of exercising that discretion for its own preservation which a person of more mature years would exercise,—I say the duty of the persons in care of the car toward such a person is much more strict, imperative and serious than it is with reference to a person fully and undoubtedly able to take care of himself, or herself, while on a car. [It has been held by our Supreme Court, the highest court in our state, with respect to a child of tender years which was allowed to be upon a car, that it is of itself evidence of negligence on the part of the railway company, when the child is permitted to remain, without special provision for its safety, upon the front platform of a car. It has been held that, in such cases, in some instances of extreme youth, the conductor or person in charge of the car, in order to absolve himself or to acquit the company which he represents of negligence, is bound to use proper force, if necessary, to put the child inside the car, or else to stop the car and put the child off.]² It is for you to say, that is one of the questions you must consider here, whether or not this boy, at the time of the accident, was so young, so inexperienced and so incapable of taking care of himself, that it was obviously the duty of the conductor or the driver, but primarily of the conductor of the car upon which the boy was riding after having paid his fare, or to a certain extent by permission, either to put the boy inside the car by the exercise of proper force or authority, or, if he would not obey, to stop the car and put the boy off, for his own protection.

[If you shall be of the opinion that this child was so infantile, so young, so incapable of taking care of himself that the con-

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ductor in charge of that car must have known that he required that degree of supervision to which I have referred; that he should have been put inside the car or else put off the car in a proper way; and that this accident resulted in consequence of the boy having been allowed to be upon the front platform, in that case the plaintiff is entitled to a verdict, whether the boy jumped off or fell off, for the reason alleged by the plaintiff.]³

You will remember that there is a contradiction of testimony upon the point as to what was done with the boy when he came into the car. . . .

If the boys were put inside of the car, as I have said, the conductor, up to that time, would have discharged his duty. It is for you to say whether his duty was discharged after that, in case, I say, you should be of the opinion that the boys were at first placed inside. Of course, it was not the duty of the conductor, where he had done what the conductor has said he did, viz., put the boys inside the car, to then stand by and watch them. That was not his duty; and, if the case here is one in which a boy who, after having been properly put by a conductor within the car, of his own motion went out on the front platform and jumped off or fell off, there could be in that case no propriety in holding the railroad company responsible for the result of his injury. That would be one of those heedless, reckless things for which the boy would have to answer himself, and for which nobody could be held responsible.

But it is said, on the part of the plaintiff here, that, instead of that being the case, the boys were left upon the platform; that the conductor did not put them inside; that, subsequently when he came and asked them for their fare and they said they had paid it, he made some remark, according to their testimony, about their attempting to steal rides, or said something to that effect, and told them that they must get off if they would not pay their fare. . . .

If this boy was so young, so infantile as to need the special protection of being placed inside this car, the feature to which I now advert would, perhaps, have very little to do with the main question of responsibility on the part of the railroad company. But if he was not so young as to require that special protection, but was old enough to take a general care of himself,—old enough, I will say, for the conductor to allow him

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properly to remain upon the front platform,—it will have a bearing upon the case for you to determine just what it was that took place between the conductor and the boy.

The conductor says that he asked them for their fare, and that they replied that they had been upon the transfer car; that then he said, "Have you your pass?" and one of the boys answered, "No," and that then he said something to them about it being their duty to pay their fare. The conductor and driver both say that he, the conductor, demanded a pass. The other witnesses, Mr. and Mrs. Doris and the larger of the two boys, James (I have forgotten his last name), say that nothing was said about a pass. . . .

But supposing that in all that he did, thus far, the conductor was only doing that which he had a right to do; and supposing that he had intended, because the evidence of the payment of the fares was not presented, to require that these boys should get off the car, it was not proper for him to tell them to get off if he wanted them to do so, unless he gave them an opportunity to do so without incurring danger to themselves. This would be equally true as to this boy, if he was of an age beyond the infantile period of which I have spoken, able to take care of himself and possessed of ordinary discretion. [If what was said by the conductor, in its language, character and effect, was such as indicated to that boy, young as he was, that he was to get off; and if, under an impulse such as was natural for a boy of his age, he stepped off or got off the car, in obedience to the direction thus given him, no opportunity being afforded him by the stoppage of the car to get off in safety, then it would be for you to say, if you shall believe that he jumped off the car, whether or not the boy was doing that which, in view of the circumstances, his age and his inexperience, constituted on his part contributory negligence.]⁴ If, in that, he was doing only that which was natural for him to do, and that which would be expected from a boy of his age, that which he did would not relieve the company from responsibility for the results of the act of the conductor. . . .

There is evidence, from both sides of the case, as to the effort which the driver made to prevent any injury to the boy, which, to my mind, would be quite satisfactory upon that point. If the boy had discretion to conduct himself safely, even if he

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were told by the conductor, in a threatening way, to get off, and if, with that, there was something more, and the driver, as the boy stepped down, attempted once or twice to push him back, then I would say that you would regard that as quite important evidence in the way of exhibiting a want of due care on the part of the boy. I am speaking now upon the assumption that you shall be of the opinion that the boy was able to take care of himself. If he was able to take care of himself, that showing would go very far in warranting the opinion that the boy was guilty of contributory negligence, and therefore was in a position in which he could not recover.

I have now said all that I desire to say to you upon the general features of the case. If you shall be of the opinion, from the evidence, that there is no satisfactory proof that the railway company was negligent; in other words, if it is your candid conviction that it does not appear here that the persons in charge of the car were negligent, then you will have nothing to do, under your oaths, but to render a verdict for the defendant. If, on the other hand, you think it has appeared satisfactorily to you that there was negligence on the part of some person in charge of the car, that is, that there was a failure to do something which ought to have been done in regard to this boy, or that something was done which ought not to have been done toward him, and that there was no negligence on the part of the plaintiff, in view of all the circumstances of the case, then you would be obliged to render a verdict for the plaintiff, and in that event another question would arise, as to which I will say a few words, and that is: What should be the damages that should be awarded?

I have been requested by the counsel for the defendant to instruct you upon the following points:

1. If the plaintiff, after the conductor came to the door, stepped down upon the lower step and was at once seized by the driver and placed back on the platform back of the driver, and if he at once stepped down again and was again placed on the platform back of the driver, and if he, as soon as the driver released his grasp, jumped off, there is no evidence of negligence, and the verdict should be for defendant.

Answer: As that point is stated, with reference to all of the evidence in this case, I cannot affirm it. I have said to you

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that the matters which are referred to in the point are material and important, if you shall be of the opinion that this boy had discretion to an extent sufficient for him to be allowed to remain upon the front platform. In that case, you would regard the circumstances set forth in the point as of great weight, in leading you toward the opinion that the boy was guilty of contributory negligence, and therefore not entitled to recover.⁵

6. Under all the evidence the verdict should be for the defendant.

Answer: I refuse to affirm this point.⁶

The jury returned a verdict in favor of the plaintiff for \$6,000. Judgment having been entered, the defendant took this appeal, assigning for error:

1-4. The portions of the charge embraced in []^{1 to 4}

5, 6. The answers to the defendant's points.^{5 6}

Mr. Samuel Gustine Thompson, for the appellant.

Counsel cited: Phila. etc. R. Co. v. Spearen, 47 Pa. 305; Reeves v. Railroad Co., 30 Pa. 461; Phila. etc. Ry. Co. v. Hassard, 75 Pa. 377; Pittsb. etc. Ry. Co. v. Caldwell, 74 Pa. 425; West Philadelphia Pass. Ry. Co. v. Gallagher, 108 Pa. 524.

Mr. Silas W. Pettit (with him *Mr. John R. Read*), for the appellee.

Counsel cited: Taylor v. Canal Co., 113 Pa. 162; Biddle v. Railway Co., 112 Pa. 551; Pittsb. etc. Ry. Co. v. Donahue, 70 Pa. 119; Crissey v. Railway Co., 75 Pa. 83; Phila. etc. Ry. Co. v. Hassard, 75 Pa. 367; Pittsb. etc. Ry. Co. v. Caldwell, 74 Pa. 421.

OPINION, MR. JUSTICE CLARK:

In the case of an adult, or of a person reasonably competent to care for himself, it has never been held that the front platform of a crowded street-passenger car is a place of known danger, or that it is an act of negligence per se, either upon part of the company or of the passenger, that the latter is permitted to or does actually occupy that place when the car is in motion. On the contrary, in *West Phila. etc. Ry. Co. v.*

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Gallagher, 108 Pa. 524, where a boy under fourteen years of age got upon the lower step of the front platform of a crowded street car, and rode for a long distance as a passenger, and was finally thrown off by the jolting of the car, it was held not to be negligence per se, when the passenger occupied this place upon the car without objection of the driver or conductor, but that the questions of negligence, and contributory negligence, under all the circumstances, taking into consideration the age and capacity of the lad, were for the jury. The carrier, however, is bound to higher care and vigilance when the platform is crowded, in proportion as that place is more dangerous than a seat inside the car; and, in the event of an injury, this fact will be considered, in connection with all the circumstances of the case, in determining the responsibility of the carrier: *Crissey v. Railway Co.*, 75 Pa. 83.

But in the case of a passenger who is obviously and manifestly incompetent, either from extreme youth or other cause, to exercise any proper judgment or discretion for his own safety, a somewhat larger measure of duty may be said to devolve upon the conductor of a car, than under ordinary circumstances. In *Pittsb. etc. Ry. Co. v. Caldwell*, 74 Pa. 421, a little girl of five years of age, in company with another of eleven, was permitted to ride on the front platform of a street car: when she came near to her home she attempted to get off, and was injured. Mr. Justice WILLIAMS, in delivering the opinion of the court, said: "It was gross negligence to allow children of that age to get on the platform and to ride there. If they got on without his (the conductor's) permission, instead of consenting that they might ride on the platform it was the duty of the company to compel them to go inside, or to stop and put them off." It must be conceded, of course, that he is not held to the exercise of critical skill or judgment; for the performance of his ordinary duties, in a crowded car, may give him little opportunity to observe closely the capacity or intelligence of a particular person in his charge. He is, in this respect, held only to the exercise of that degree of discrimination which a reasonably prudent and observing man would be expected to exercise under the circumstances. His duties require him to give his attention not only to those who may wish to board the car, but to those who wish to leave it, as well as to

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such as remain. It is his duty to collect the fares, regulate the movements of the car, and generally to conduct the affairs of the company in his charge. He may, therefore, when the car is crowded and passengers are passing in and out, have little chance to test with accuracy the intelligence or capacity of the individual passengers. But he is bound to give his undivided attention to his business, and if any person boards his car who is obviously incompetent to choose a place of safety, or whom he knows, or as an observing and prudent man ought to know, to be thus incompetent, it is his duty to exercise the highest care and vigilance consistent with the performance of his ordinary duties, for his safety: *Phila. etc. Ry. Co. v. Hassard*, 75 Pa. 367.

The plaintiff, at the time of the injury, was a lad of eight years of age, and was held to the exercise of that degree of care and discretion ordinarily to be expected of a child of that age: *Smith v. O'Connor*, 48 Pa. 218; *Crissey v. Railway Co.*, 75 Pa. 86. On the day of the occurrence, he had been visiting the St. John's Orphan Asylum on Lancaster Avenue and Forty-eighth street. Returning home, he took the one-horse Hestonville car, coming in from Fairmount, at Forty-eighth street, and rode to the depot at Forty-third street, where passengers are transferred to the defendant's two-horse cars to be carried into the city. The plaintiff states that he had paid his fare on the Hestonville car, and that upon leaving that one, he had demanded a transfer ticket; that the conductor gave him none, but told him to get on the other car, and that he did as he was directed. He says the two-horse car was crowded, and there were probably eight or ten transfers; that the back platform was full, and that he with the other transfer passengers was directed "to go up on the front." He says, however, that he "got upon the back platform first," and "went up in the front;" that he "went inside" and "went up in the middle—up in the car"—"went all the way up—up to the front of the car." In this the plaintiff's testimony differs from that of all his own witnesses, who say that he boarded the car at the front platform, and remained there until the time of the injury. Even the conductor says he "thinks he entered the car by the front platform," but he states positively that he was within the car before the car started. It is highly probable that the little boy's statement

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is the correct one, as he could not well be mistaken as to a fact so likely to be remembered, and which he states so positively and circumstantially. Under the circumstances, he might well be supposed to know exactly what he did better than any of the passengers or the conductor, who at this particular moment had no interest or concern in him or his movements. He was a small boy, and in the confusion caused by the entry of eight or ten passengers, might readily have worked his way through the crowded car without being observed.

If the statement made by the plaintiff is true, and certainly he cannot complain if the facts are assumed to be as he himself states them, he was, in fact, inside the car when it started, as the conductor states he was; and it would seem that he voluntarily and without the knowledge of the conductor pushed through to the front platform, where his companion was and where the conductor found him at and immediately before the time of the injury. The jury found that the conductor had not put the plaintiff into the car at the front door, and this is probably true, but if by any means he had, in fact, entered the car, the conductor's duty in this respect was done. The car had only proceeded a little more than a square from the depot, when the conductor, having collected the fares on the rear platform and in the body of the car, came forward, opened the wicket in the front door, and demanded the fares of those on the front platform, among whom were these two boys. What then occurred is stated by the plaintiff's witnesses substantially as follows: The conductor asked McCoy, the larger boy, for his fare; McCoy replied that he had paid his fare on the other car. The conductor said that was "an old guy," that he was "trying to steal a ride;" that he must either pay his fare, or he would have to get off. This conversation was addressed to McCoy, but was within the hearing of the plaintiff. The conductor opened the door, and, as he did so, the plaintiff stepped with one foot down on the step of the car, and, holding to the iron support at the side of the car, attempted to get off backward. The driver caught him, and placed him back on the platform, saying, "Don't you get off, you will fall," but almost immediately thereafter he repeated the act; and, although the driver again attempted to push him back, he was either thrown off, or jumped off, backward, receiving the injury complained

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of. There is no evidence of a permission to ride on the front platform, except such as might be inferred from what occurred after the conductor came to the front door, and we think sufficient time did not elapse after that, nor was anything said or done to justify any fair or reasonable inference of the conductor's permission to that effect. The whole occurrence appears to have been the affair of a few moments; almost at the instant when the door opened the injury occurred. Mrs. Doris says the time was not perceptible. If there was any evidence of negligence on the part of the conductor, it was certainly a mere scintilla.

In his charge to the jury the learned judge entirely overlooked the plaintiff's own statement as to how he came upon the front platform. The case was submitted to the jury exclusively upon the testimony of the other witnesses. The plaintiff was examined as to his competency, at the instance of his own counsel, and was found to be qualified. His testimony was taken in his own interest, and it seems reasonable that his statement and admissions under oath, at the trial, against his own interest, ought not to have been wholly ignored, or withdrawn from the jury. It may be that a party, when he takes the stand as a witness in his own behalf, is not absolutely concluded by his own testimony, but when he testifies in a circumstantial and detailed manner as to a fact peculiarly within his knowledge, and which if believed would prevent his recovery, his testimony is certainly not to be entirely disregarded upon the mere assumption that he may have been mistaken; especially is this true, when he is not recalled to explain or retract the statement.

If the plaintiff's own testimony is true, and we cannot assume that it is either mistaken or false, then the sixth assignment of error should have been sustained; that is to say, there is not evidence from which the negligence of the company can fairly be inferred. The first and sixth of the defendant's points were submitted upon the plaintiff's statement of his own case; and, whilst perhaps the defendant was not in strictness entitled to an unqualified affirmation, the answers and the charge tended to mislead the jury, and upon this ground

The judgment is reversed, and a venire facias de novo awarded.

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JESSE GYGER v. PHILA. ETC. RY. CO. ET AL.

APPEAL BY A. R. MONTGOMERY, ADMR., FROM THE COURT OF
COMMON PLEAS NO. 2 OF PHILADELPHIA COUNTY.

Argued January 17, 1890—Decided October 6, 1890.

[To be reported.]

1. When either of the words, railroad or railway, is used in a statutory or constitutional provision, and the context is without indication that a particular kind of road is intended, the provision will be held applicable to every species of road embraced in the general sense of the word used: Hestonville etc. R. Co. v. Philadelphia, 89 Pa. 210.*
2. But, though the words, railroad and railway, are thus synonymous, yet, when either one or the other of them is used in a provision, and it is evident from the context that a particular kind of road is intended, that kind of road only will be held to be the subject-matter of the enactment.
3. Section 4, article XVII. of the constitution, providing that "no railroad, canal or other corporation . . . shall consolidate . . . with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning . . . a parallel or competing line," is not applicable to street-railway companies.
4. The passenger travel over parallel streets of cities is not necessarily a competing travel, and it is quite clear, therefore, that the sense of "competing," which is the essential sense of the prohibition of the section, is not applicable to the travel upon the streets of cities and towns over street-passenger railways.

Before PAXSON, C. J., STERRETT, GREEN, WILLIAMS, McCOLLUM and MITCHELL, JJ.

No. 106 July Term 1889, Sup. Ct.; court below, No. 332 December Term 1883, C. P. No. 2.

On December 29, 1883, Jesse Gyger filed a bill in equity against the Philadelphia City Passenger Railway Company and the West Philadelphia Passenger Railway Company, setting forth that he was the owner of thirty-six shares of the capital stock of the first named company, and further averring in substance as follows:

2. That the Phila. City Pass. Ry. Co., incorporated by the acts of March 26, 1859, P. L. 243, and March 31, 1859, P. L.

* See Millvale Bor. v. Evergreen Ry. Co., 131 Pa. 1.

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325, had maintained a street-passenger horse-car railroad in the city of Philadelphia until 1866, a single-track railroad on Chestnut, Front, Walnut and Twenty-second streets, and since 1866, in addition to that route, a double-track railroad on Chestnut to Forty-second street, running cars continuously over the whole of the above described route between Front and Forty-second street, this being regarded as the main or trunk line of the railroad. That the company also had operated since 1870 a branch road running southwesterly from the main line on Woodland Avenue or Darby road, the cars running continuously on this and on the main line east of Thirty-third street. That the company had constructed and operated since 1874 a double-track branch railroad, by which their horse cars had made continuous trips on the line east of Thirty-second street, on Thirty-second street, and Lancaster and Belmont Avenues to Elm Avenue.

3. That the West Phila. Pass. Ry. Co., incorporated by the act of May 14, 1857, P. L. (1858) 585, had, since 1858, maintained a double track street-passenger railway, operated by horse cars and at times partly by steam cars, on Market street between Front and Forty-first streets, and on Forty-first street between Market and Haverford street; and also four branches including to the corner of Elm and Belmont Avenues on Forty-first street, Elm Avenue and Fortieth street; and between the corner of Thirty-second and Market streets and the corner of Forty-first and Baring streets, a double-track via Thirty-second, Arch, Thirty-third and Baring streets, on which through cars were run between Forty-first and Haverford streets and Front and Market streets.

4. That between Front and Thirty-second streets, the lines of both the companies were entirely parallel, at the distance between Market and Chestnut streets of 469 feet, and between Market and Walnut street of 1,029 feet. That the Lancaster Avenue branch of the Phila. City Pass. Ry. Co. and the branches of the West Phila. Pass. Ry. Co., via Baring street, and to Elm Avenue, ran in proximity to each other and to the same destination.

5. That these lines and branches of the two companies were competing roads, and that they were subject to the provisions of article XVII. of the constitution.

6. That the West Phila. Pass. Ry. Co., having no prior au-

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thority to use steam power, ran steam-passenger cars for a period exceeding one year, under authority of the act of May 8, 1876, P. L. 147, and a city ordinance passed thereunder of June 2, 1876; that the said company in 1880, increased their capital stock under and by virtue of the provisions of the act of April 18, 1874, P. L. 61; that since such use of steam cars and the increase of their capital stock, this company had held its charter subject to the provisions of the present constitution and had accepted all the provisions of article XVII. thereof.

7. That the boards of directors and some of the stockholders of the two companies had entered into a preliminary agreement for the leasing of the Phila. City Pass. Ry. Co., to the West Phila. Pass. Ry. Co., for a long period, and that meetings of the stockholders of each company were about to be held for the purpose of acting on this proposed lease.

8. That the proposed lease was to be for nine hundred and ninety-nine years, of the franchises, tracks, cars and all other property of the Phila. City Pass. Ry. Co., at a yearly rental of \$6.50 per share of the capital stock of the former company, for four years, of \$7 per share for two years thereafter, and until the end of the term, of \$7.50 per share, which payments were to be in full discharge of the rights and interests of the complainant and other stockholders.

9. That these rates of rental were inadequate, and that the lease would deprive the stockholders of their just interest in the company and its earnings, and would have the effect of transferring the present surplus of earnings and property, and also the future net earnings, to the lessees.

10. That such leasing would be illegal; the Phila. City Pass. Ry. Co. would be exposed to irreparable loss, and its charter imperiled; and that each company was without legal authority to execute the lease.

The prayers of the bill were: 1. That the proposed lease by the Phila. City Pass. Ry. Co. be declared illegal: 2, 3. For an injunction, preliminary until final hearing, then to be made perpetual.

A hearing being had on a motion for a preliminary injunction, upon affidavits filed and presented with the bill, the motion was refused, MITCHELL, J. Thereupon, on January 31, 1884, the plaintiff took an appeal to No. 318 January Term

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1884, Sup. Ct. This appeal was argued in the Supreme Court on January 16, 1885, and on February 2, 1885, an opinion was filed, *Per Curiam*, in which it was held that ample time had intervened to have had a final decree in the court below, where the disputed facts could have been passed upon by a master and the court; that the pendency of the appeal did not suspend the proceedings in the court below: Act of February 14, 1866, P. L. 28; Sheaffer's App., 100 Pa. 379; and the decree of the court below, refusing the preliminary injunction, was affirmed, and the appeal dismissed: See Gyger's App., 15 W. N. 513.

On May 13, 1886, the record was returned with remittitur, when a rule was taken requiring the defendants to plead, answer, or demur. Thereupon on July 7, 1886, the Phila. City Pass. Ry. Co. filed a demurrer, and for cause thereof assigned the following reasons:

1. It is not a railroad corporation within § 4, article XVII., of the constitution of this state, as appears from the facts stated in said bill.

2. If it were a railroad corporation within said section of said article, it does not appear from said bill that the same has ever been accepted by this defendant.

3. If it is a railroad corporation within said section of said article, the lines of the railway companies, defendants herein, as appear by the charters thereof cited in said bill, do not constitute parallel or competing lines, inasmuch as the same are laid and operated on different streets within the limits of a city and have different termini; street mathematical parallelism, nor merely eastern and western endings, not constituting prohibited lines, within the meaning of the said section of said article, as in said bill is erroneously averred.

4. That the said bill contains no matter of equity whereon this court can ground a decree, or give complainant any relief as against the defendant.

Argument having been had, a decree was entered on June 17, 1887, without opinion filed, sustaining the demurrer and dismissing the plaintiff's bill with costs. The plaintiff having died pending the cause, his administrator took this appeal, assigning said decree for error.

Mr. Henry M. Dechert and *Mr. Thos. H. Walker* (with them *Mr. Henry T. Dechert* and *Mr. L. B. Walker*), for the appellant:

Arguments.

1. It will be noticed that both the defendant companies were incorporated after the passage of the act of May 3, 1855, P. L. 423, and their charters are therefore subject to the power of the legislature, "to alter, revoke, or annul the same." All corporations falling within the terms of that act, or of the constitutional amendment of 1857, are, so far as the provisions of that statute or that amendment extend, concluded by the action of the convention of 1873: *Penna. R. Co. v. Duncan*, 111 Pa. 361. Moreover, the West Phila. Pass. Ry. Co. accepted the provisions of the act of May 8, 1876, P. L. 147, relating to the use of motive power upon passenger railways. Under that act, the city councils, on June 2, 1876, passed an ordinance permitting that company to use steam street cars upon its tracks, and the official reports to the secretary of internal affairs show that steam cars were so used by said company. Again; in 1880, the said company increased its capital stock under the provisions of § 5, act of April 18, 1874, P. L. 61, and its return to the secretary of the commonwealth shows that fact. This action estops the company from denying that it has accepted the benefit of the act in question.

2. A corporation has no power to do any act not expressly authorized by law, or necessarily implied: *Commonwealth v. Railroad Co.*, 27 Pa. 339; *Packer v. Railroad Co.*, 19 Pa. 218. And a power to lease its entire property is not an implied power of a corporation like this: *Pierce on Railroads*, 496; 1 *Redf. on Railways*, 587; *Lauman v. Railroad Co.*, 30 Pa. 42; *Black v. Canal Co.*, 24 N. J. Eq. 455; *Susq. Canal Co. v. Bonham*, 9 W. & S. 27; *Thomas v. Railroad Co.*, 11 Otto 71; *Middlesex Railroad v. Railroad*, 115 Mass. 347. As there is no express power conferred by the charters of these companies, the power to lease must therefore be found, if found at all, in a general law. In the court below, the authority was claimed by virtue of the act of April 23, 1861, P. L. 410, making it lawful for "railroad companies to enter into contracts for the use or lease of any other railroads," etc.; but § 4, article XVII. of the constitution of 1874, provides: "No railroad, canal or other corporation, or the lessees, purchasers, or managers of any railroad or canal corporation, shall . . . lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning or having under its control a parallel or competing line," etc.

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3. Assuming that these two corporations are subject to the constitution of 1874, the effect of the provision quoted is to add to the act of 1861 the following proviso: "That nothing herein contained shall authorize any railroad company to lease any parallel or competing railroad." It will be observed that the word railroad, is used both in the constitution of 1874 and in the act of 1861, and it is contended that the meaning of the term is the same in both instances. The defendants cannot say they are railroads, to reap the benefits of the act of 1861, and then turn about and say they are not railroads, to avoid the disabilities imposed by the constitution. The word railroad, in the act and in the constitution, will not be presumed to have been used in a different sense: *Regina v. Holborn Union*, 6 Ad. & E. 68, 69; *Sedgwick on Stat. & Const. Law*, 2d ed., 225; *Mayor v. Davis*, 6 W. & S. 280; 1 Bl. Com., 59 n. And if a doubt exist, as to the right of the defendant to enter into the lease, the doubt is decisive of the case, and must throw the decision in favor of the plaintiff: *Commonwealth v. Railroad Co.*, 27 Pa. 351; *Commonwealth v. Railway Co.*, 52 Pa. 518; *Packer v. Railroad Co.* 19 Pa. 218.

4. But the term railroad, has already received a construction by this court in similar statutes, and the matter is no longer an open question. In *Hestonville etc. R. Co. v. Philadelphia*, 89 Pa. 210, 219, it is held that the term railroad, includes and embraces that class of railroads laid upon the streets of a city and operated by horses. This decision was followed and approved in *Citizens Pass. Ry. Co. v. Pittsburgh*, 14 W. N. 268. While the latter decision was upon the particular statute under consideration, the general principles stated to sustain it are equally applicable in the construction of § 4, article XVII., of the constitution. Railroad and railway, are as nearly exactly synonymous as any two words in the language: *State v. Brin*, 30 Minn. 524. The natural use of the term railroad, must lead to this construction of the constitutional provision. A constitution, moreover, is not to receive a technical construction, like a common-law instrument or a statute: *Commonwealth v. Clark*, 7 W. & S. 127, 133; *Gibbons v. Ogden*, 9 Wheat. 188; *Manley v. State*, 7 Md. 135, 147; *Cooley on Const. Lim.*, *56.

5. Although the debates of a convention to frame a constitution cannot be resorted to as aids in its construction: *Taylor*

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v. Taylor, 10 Minn. 107; Eakin v. Raub, 12 S. & R. 330, 352; no more than may the motives, reasons, or opinions expressed by individual members of the legislature be considered in construing a statute: Aldrige v. Williams, 3 How. 1; Bank of Penna. v. Commonwealth, 19 Pa. 144, yet nothing can be shown that occurred during the consideration of § 4, article XVII. of the constitution, which can be construed to indicate an intention of the convention, or of any members thereof, not to extend the operation of the section to street-passenger railways. Reference is made to the title of the article, "Railroads and Canals;" and to the several sections 1, 2, 4, 5, 7, 8, and 9, and the result of the examination is that nearly every provision in the article has full application to street-passenger railways. To intimate that the whole system of city-passenger railroads was too insignificant for the contemplation of the people, in adopting their frame of government, is an absurdity.

Mr. David W. Sellers and Mr. John G. Johnson, for the appellees.

The defendants executed a lease of the one road to the other in 1883. Since then the cars have been running in accordance with the lease. That lease was executed pursuant to the act of April 23, 1861, P. L. 410. In *Phil. etc. R. Co. v. Railroad Co.*, 53 Pa. 60, this act was interpreted to authorize a lease where there "is such a union of tracks as to admit the passage of cars from one road to the other, or such intersection of roads as to admit the convenient interchange of passengers at the point of intersection;" with a limitation, in *Wood v. Railroad Co.*, 8 Phila. 94, that the act applies only to constructed roads. As street passenger railways were included in this legislation: *Hestonville etc. R. Co. v. Philadelphia*, 89 Pa. 211, no question can arise upon the validity of the lease, unless the constitution forbids it.

1. Street-passenger railway companies are not within the provisions of § 4, article XVII. of the constitution. This section obviously refers to the railroad and canal companies enumerated in §§ 1, 3 and 7, of that article. At the time the constitution was framed, there were railroads which had cars with motive power and which transported persons and goods. These sections evidently apply to such railroads. But street-

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passenger railways are specially referred to in § 9: "No street-passenger railway shall be constructed within the limits of any city, borough or township, without the consent of its local authorities;" following the distinction taken in § 12, act of April 4, 1868, P. L. 65, the general railroad act: "This act shall not be so construed as to authorize the formation of street-passenger railway companies to construct passenger railways, under or by virtue of its provisions, in any city or borough," etc.

2. A lease by one passenger-railway company to another, under the act of 1861, was sustained in *Shipley v. Railroad Co.*, 13 Phila. 129. But, though a power to lease was conferred by that act, which refers to railroad companies, the plaintiff contends we are inconsistent in denying that we are within the restriction of § 4, article XVII., which prohibits leases by competing or parallel railroads. Nothing is better settled, however, than that a word may be held to mean one thing in one act of assembly, or instrument, and something else in another. "Words vary in their import, according to the subject to which they are applied:" *Potter's Dwaris*, 230. In a technical sense, a street railway is not a railroad: *Louisville etc. R. Co. v. Louisville Ry. Co.*, 2 Duv. (Ky.) 175; *Johnson v. Railway Co.*, 10 Bush. (Ky.) 231; *Matson v. Brand*, 3 App. C. (H. L.) 1082. While we concede that even in Pennsylvania the term railroad, is sometimes used to describe a street railway, and the term railway, is occasionally used as a synonym for railroad, we recall no instance of a legislative use of the word railroad, as a generic term including both classes.

3. Our contention is, not that a railway may not be included within the designation of a railroad, but that it is not so included in the absence of some indicia, and that it certainly is not when the indicia of the context are all opposed to such conclusion. In *Hestonville etc. R. Co. v. Philadelphia*, 89 Pa. 210, the court did not decide that the term railroad, necessarily included a street railway. On the contrary, the opinion delivered shows that the fact was recognized, that "in the statutes one class was generally styled railroads, and the other more frequently, but not always, railways," and that the interpretation given to the term railroad, in the act of 1861, was

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the result of an examination of other statutes, and the absence of any indication in the statute itself, on the part of the legislature, to use the word in its restricted sense. As suggested, however, the construction put upon the word railroad, in one act of assembly, by reference to its meaning as used in another, does not govern where we are seeking its meaning when used by the constitutional convention.

4. Although the title of article XVII. of the constitution is confined to railroads and canals, there are undoubtedly some provisions in it applicable to street railways and transportation companies generally. When, however, street railways and transportation companies are meant to be included, they are specially referred to, and the convention was not satisfied, where this was the intention, to use the word railroad generally. The title to the article shows the general intent and subject matter of it. Finding as we do, that where railways were meant to be included they were referred to by that designation, it is difficult to resist the conclusion that where the word railroad was used by itself, it was used in its ordinary and limited sense. We are not obliged to rest on this inference alone, however, because we find in the context of each section that which shows clearly that the thought was limited to railroads strictly, as popularly understood.

OPINION, MR. JUSTICE GREEN:

It is undoubtedly true, as we have several times decided, that the words "railroad" and "railway" are synonymous, and in all ordinary circumstances they are to be treated as without distinction of meaning. When either one or the other of these words is used in a statute, and the context requires that a particular kind of road is intended, that kind of a road will be held to be the subject of the statutory provision; but if the context contains no such indication, and either of the words is used in describing the subject-matter, the statute will be held applicable to every species of road which is embraced within the general sense of the word used. All of this was decided in the case of *Hestonville etc. R. Co. v. Philadelphia*, 89 Pa. 210, where we held that the act of May 16, 1861, P. L. 702, entitled "An act relating to railroad companies," and authorizing the consolidation and merger of railroad companies, em-

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braced within its meaning street passenger railroad companies as well as steam railroad companies. The reasoning of the opinion was principally upon the proposition that the expressions "railroad" and "railway" were in fact synonymous terms, and that there was nothing in the context of the act inconsistent with the application of the word "railroad" to a street passenger road. It was conclusively shown in the opinion that the legislature was in the constant habit of using both words indiscriminately as expressing the same thing. No necessary inference is therefore to be drawn from the mere use of either word that a limited class of roads was intended. It follows that we must search the context of the seventeenth article of the constitution in order to ascertain in what sense the word "railroad" was used in the fourth section. It is the contention of the appellant that the prohibition of the section against the amalgamation of competing roads applies to street passenger railroad companies as well as to those of steam roads, and, if this contention is unsound, the appellant has no case.

The title of the article is "Railroads and Canals." This is, of course, sufficiently comprehensive to embrace all classes of railroads and railways; and we accordingly find that a number of the sections are applied to steam railroad companies exclusively, and at least one section, the ninth, is applied exclusively to street passenger railway companies. The first section provides that all railroads and canals shall be public highways; that any association organized for the purpose shall have the right to construct a railroad between any points within the state, and to connect at the state line with railroads of other states; and that every railroad company shall have the right to intersect, connect with, or cross any other railroad, and shall receive and transport, each, the other's passengers, tonnage, and cars without delay. It must be conceded at once that this section cannot possibly apply to street passenger railway companies, as all its provisions are utterly hostile to such a thought. Section third provides that all individuals, associations, and corporations shall have equal right to have persons and property transported over railroads and canals, and no unreasonable discrimination shall be made in charges for, or in facilities for transportation of freight or passengers within this state, or crossing from, or going to, any other state. It is equally cer-

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tain that this section, also, cannot embrace passenger railway companies, since such companies are, as a rule, though not always, without authority to carry freight, and do not extend to state lines. The fifth section is also inapplicable to street railroad companies, because it imposes disabilities upon carrying companies against engaging in mining or manufacturing articles for transportation over their roads; and, as street passenger companies do not transport articles of manufacture over their roads, as a regular business, they are not included within the manifest meaning of the section. The same remarks apply to the sixth section, which imposes the same disabilities upon officers as are imposed by the fifth section upon the companies themselves. The seventh section plainly relates to the transportation of merchandise or freights, and hence is equally inapplicable to street passenger companies. The eighth section prohibits any railroad, railway, or other transportation company, from granting free passes to any persons but officers and employees. This section relates to the carriage of passengers only, and it plainly includes street passenger companies as well as all others, because it expressly mentions "railroad" and "railway" companies. But, because it uses both terms, "railroad" and "railway," a most convincing argument arises that the convention considered it necessary to use both in order to embrace both, and hence it must be considered they did not intend to include both in the other sections where only one is used. The force of this argument is greatly strengthened when we consider the ninth section, which provides that "no street passenger railway shall be constructed within the limits of any city, borough, or township, without the consent of its local authorities." It is perfectly clear that the convention did not regard the word "railroad" as synonymous with "railway" or "street passenger railway," when this section of the article was framed. It is equally conclusive that they were perfectly conscious of the difference between the two classes of roads, and that when they intended to make provision respecting "street passenger railways," they considered it necessary to use this kind of phraseology in order to designate them. Can the courts do any less? Can we attribute to them any other meaning than the one they have, by well-chosen words, clearly expressed, when they desired to make provision for this partic-

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ular class of roads? Are we at liberty to infer, in considering the fourth section, where they made a provision as to railroad and canal companies, that they intended by that mode of description to designate "street passenger railway companies" as well? We think not. Having a full knowledge of the precise manner in which they considered it necessary to express themselves when they desired to provide for "street passenger railway companies," we find that in the fourth section they entirely abstain from that mode of expression, or from any similar phraseology. We must conclude that the reason for such abstention was that they did not intend to include them in the prohibition of the fourth section.

This is the obvious and natural conclusion to reach, and we know of no reason why we should not regard it and be governed by it. If we consider the subject-matter of the fourth section, we are strengthened in the correctness of this conclusion. It provides that "no railroad, canal, or other transportation company, or the lessees, purchasers, or managers of any railroad or canal corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning, or having under its control, a parallel or competing line." The subjects of the prohibition are railroad and canal companies. They are classed together as the subjects of a prohibition common to both. Railroads and canals are means of transportation which relate to and cover the territory of the state. In their ordinary understanding by the people they are regarded as methods of carriage of freights and passengers—most largely of freights—between distant points within the state, and to the borders of the state, so as to connect with other similar systems of transportation without the state to still more remote points. It would be a most strained and unreasonable conclusion, to hold that the constitutional convention, when it plainly, and for wise reasons, prohibited the amalgamation of railroads and canals of this character, and parallel or competing with each other, had any possible reference to the mere passenger travel over the streets of cities and towns. There is nothing in the section or in the article XVII. itself indicating that the convention had any such thought or any such purpose. There is no argument in sup-

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port of such a theory except that which is based upon the generality of the word "railroad;" but it has been already seen that there is no necessary, essential force in that argument considered by itself alone; that it is always subject to the effect of the context when considered in connection, and that upon such a consideration in this particular case it falls to the ground.

We think, also, that it is quite clear that the sense of "competing," which is the essential sense of the prohibition, is not applicable to the travel upon the streets of cities and towns over passenger railways. The competition of traffic between distant points, by rival roads and canals, tends to promote cheap transportation and thereby tends to the public good. But, if this is suppressed by the absorption of one of the competing lines by the other, the wholesome competition ceases and higher rates soon result. This is the evil which was sought to be prevented by the fourth section of the seventeenth article. It will be seen at once that it is inapplicable to the travel upon streets of cities and towns on passenger railways. The travel over parallel streets is not necessarily a competing travel. Each street has travel of its own which is conducted upon its own railway. That travel may be almost entirely conducted without competition with the travel upon another though parallel street, nor do railways upon parallel streets have the same termini. Many of them, though running upon parallel streets for a considerable distance, diverge altogether from such a course at their extremities. Two roads would be competing if laid upon the same street, and running in the same direction, but that is not this case, and probably is not the case anywhere in the state. Moreover, no freight is carried upon passenger railways, and it is the carriage of freight that was probably of principal importance in the design of the fourth section. All the analogies which would liken the traffic upon street railways with that upon the railroads and canals of the state are wanting, and hence we are without authority to impose upon the language of the fourth section a meaning which does not reside in its words, and which does not result by any rational implication. The language used in the fourth section in designating the objects of its provisions is precisely the same as is used in all the other sections for the same purpose, and when passenger

Syllabus.

railways are intended to be indicated a different phraseology is employed. We find nothing in the fourth section indicating that the word "railroad" was there used in any other sense than that in which it was manifestly used in the other sections, and we are therefore not at liberty to give it any other meaning than is apparent in those sections. We think the court below was right in dismissing the plaintiff's bill.

The decree of the court below is affirmed, and the bill of the plaintiff is dismissed at the cost of the appellant.

Mr. Justice STERRETT dissented.

JOHN WISCHAM v. GEORGE RICKARDS.

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190	557

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223	445

APPEAL BY DEFENDANT FROM THE COURT OF COMMON PLEAS
NO. 2 OF PHILADELPHIA COUNTY.

Argued January 21, 1890—Decided October 6, 1890.

[To be reported.]

1. A servant cannot, by any act of his, impose upon his master a higher liability for negligence than the master is under to the servant himself; and one who assists such servant in his duties, at the servant's request only, can have no other or different remedy against the master, for negligence, than the servant had.
2. That the person assisting can have no higher rights than the servant in the performance of whose duties he joins has, is not so much because he is a volunteer, as because he makes himself one of a class, who, as against the master, have no right of recovery for the negligent acts or conduct of each other.
3. Wherefore, as one who is engaged in the service of a common master, and in a common employment, cannot recover against the master for the negligence of a fellow-servant, whether paid for his service or not, so, if a stranger join at the request of a servant and is injured, he is in no better position than a mere volunteer.
4. Nor, when one joins in a service and is injured therein by the negligence of a servant, is the master's liability increased by the fact that such assistance was rendered by the person injured, in obedience to an order of his own superior, made in response to a call proceeding from the servant to whom the assistance was given.

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5. The same rule will apply where the work, in the doing of which the injury is received, is one in which the master of the person injured, and the master to whose servant, in response to the servant's call, the assistance of the injured party is rendered, are jointly interested, and the servants of both are employed to accomplish it.
6. *Potter v. Faulkner*, 1 B. & S. (101 E. C. L.) 800; *Flower v. Penna. R. Co.*, 69 Pa. 210; *Degg v. Railway Co.*, 1 H. & N. Exch. 773, followed: *Abraham v. Reynolds*, 5 H. & N. Exch. 143; and *Wright v. Railway Co.*, L. R. 1 Q. B. Div. 252, distinguished.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM, and MITCHELL, JJ.

No. 155 July Term 1889, Sup. Ct.; court below, No. 65 June Term 1887, C. P. No. 2.

On May 5, 1887, John Wischam brought trespass against Charles A. Blessing and George Rickards, to recover damages for injuries received through the alleged negligence of defendants. Issue.

At the trial on November 22, 1887, the plaintiff's case having been closed, on motion of the defendants a judgment of nonsuit was entered, with leave, etc. On February 24, 1888, a rule to show cause why judgment of nonsuit should not be taken off having been argued, the rule was made absolute as to defendant Rickards only.

At a second trial on October 18, 1888, the facts made to appear were in substance as follows:

The defendant Rickards was a machinist who had entered into a contract to deliver to the other defendant, Blessing, a large fly-wheel ten feet in diameter and weighing five thousand pounds. Blessing was a manufacturer of plumbing goods, and Wischam was in his employ as a packer. The wheel was brought to Blessing's place of business for delivery, on November 2, 1886, in two sections, in charge of three men, Harvey, Hubert and Donovan. The first section of the wheel, one half of it, was brought between nine and ten o'clock in the morning. A derrick and block and tackle were to be used to unload the section. To rig the derrick, it was suggested that the rope be fastened about a scantling placed within and across a window of the second story of the building; but, for greater safety, the rope, by direction of Mr. Blessing, was run around an inside wall of the second story and there fastened. The section

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was then lowered safely from the wagon to the pavement. At the suggestion of Blessing, the derrick and rigging, which belonged to Rickards, were left in position to enable Blessing's men to place the section within the building before the delivery of the other section. Blessing then went away and was absent the remainder of the day. His men constructed a platform to the level of the doorway of the building, about two feet high, and proceeded to lift the section from the pavement to the platform by means of the block and tackle. They had got the section above the height of the platform, when the defendant's workmen came with the other section. The workman with the wagon desired that the second section should be unloaded at once. The first section was then let down to the pavement and stood on its edge between the platform and the building, resting against the building. The block and tackle were then put to the second section on the wagon, and, after they had lifted it from the wagon and had it above the platform, Harvey, in the employ of Rickards, asked Wiegner, Blessing's foreman, to call for assistance. Wiegner called out Wischam, the plaintiff in this case. When the section was being lowered upon the platform, Wiegner used a pry to keep it from the wall and Wischam had hold of the rope, standing outside the wheel with Donovan behind him. The section was in that position when it became blocked, the upper part upon the section against the wall, and the lower part upon the platform. Harvey stopped the lowering, got down from the wagon, and, standing on the section, his exact position being disputed, unfastened the chain or rope, when the section fell and turned over upon the plaintiff inflicting severe injuries.

At the close of the testimony, the court, FELL, J., charged the jury:

Before going into this question I had better call your attention to the law which must govern you in the consideration of this case, which I will do by answering the points which have been presented by the counsel for the defendant. I have been asked to say to you:

1. A master is not liable for the unauthorized negligent act of a competent servant, occasioning injury to a person voluntarily assisting another servant in the performance of his duty.

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In this case, the evidence is that the plaintiff was a person voluntarily assisting the servants of Mr. Blessing in the unloading and placing of the wheel, and that he was not employed by the defendant Rickards, or by any one for him. Under these circumstances the verdict of the jury should be for the defendant.

Answer: I decline to so charge.¹

2. If the jury believe that the defendant Rickards sent reliable men to unload the wheel at Blessing's place of business, and that these men were proceeding to and did unload it in a proper way; in such case, notwithstanding the accident to the plaintiff, he would not be entitled to recover in this action, and their verdict should be for the defendant.

Answer: I affirm this point, it being understood that unloading it in a proper way includes their conduct throughout. The manner of unloading might be proper, and there still might be negligence in the details of carrying out the plan. If there was no negligence on the part of Mr. Rickards' men, there can be no recovery against him.

3. If a stranger, invited by a servant to assist him at his work, is, while engaged in giving such assistance, injured by the negligence of another servant of the same master in the course of his employment, the stranger cannot hold the master responsible. The stranger, by giving his assistance, cannot impose upon the master a greater liability than that in which he stands towards his own servant; and, if the master takes care that his servants are persons of competent skill and ordinary carefulness, he is not liable for any injury that one of them may receive from the negligence of another.

Answer: Gentlemen, I affirm this point, but you will consider what I say in answer to another point as to a stranger and a mere volunteer.²

4. If the jury believe that the plaintiff in this case was asked by a servant of Mr. Blessing to assist in the unloading and placing of this wheel, and that the accident by which he was injured was caused by something done or omitted by one of the servants of Blessing, there can be no recovery against the defendant, and the verdict of the jury should be for the defendant.

Answer: I affirm that.

5. If the jury believe that at the time the wheel was carried

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to the place of business of Mr. Blessing, Mr. Blessing took charge of the delivery and placing thereof, and the defendant's men acted under his directions, in such case there could be no recovery for this accident against the defendant, and their verdict should be for him.

Answer: I affirm that point, gentlemen, but you will remember in this connection the testimony as to what Mr. Blessing did in the matter. When the wheel was delivered at his place, they attempted to unload it by placing a scantling across the window on the inside, and attaching ropes to that. Mr. Blessing, fearing that that would injure the walls of his building, which were not strong, directed that it be taken down and ropes passed around the inside wall of the building; that was done. That, gentlemen, had nothing to do with the accident. If the wall had pulled down; if any of the appliances which Mr. Blessing had put there had broken, then the responsibility would clearly rest upon him. The only other thing he did was to direct the erection of the platform the same height as the door, in order that the wheel might be lowered on it. As I said to you a moment ago, if the wall had pulled out, or the platform had broken, and caused the accident, Mr. Blessing would have been wholly responsible.³

6. If the jury believe that the unloading of this wheel was a dangerous operation, that is not enough to justify a verdict against the defendant, as the unloading was necessary; if the manner adopted, was as good as any that could have been adopted, it matters not how dangerous it was; and, if the jury believe that proper care was used in the manner of unloading this wheel, then their verdict should be for the defendant.

Answer: I affirm this point.

7. If the jury believe that the falling of that portion of the wheel, by which the plaintiff was hurt, was by the prying thereon, or working thereat, by some one in the employ of Mr. Blessing, then their verdict should be for the defendant.

Answer: I affirm that.

8. If the jury believe that the plaintiff, in pulling or dragging on the chain or rope attached to that part of the wheel, which fell over, caused the fall thereof, their verdict should be for the defendant.

Answer: I affirm that.

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9. If the jury believe that the presence of Mr. Blessing's wagon in the street at the curb prevented the escape of the plaintiff from the section of the wheel as it fell over, and that, but for the presence of that wagon, the plaintiff, by the exercise of due care, would have escaped, their verdict should be for the defendant.

Answer: I decline, gentlemen, to so charge you. If the presence of the wagon had caused the accident, this would be the case, but the wagon was not the proximate cause of the accident. Its presence was a circumstance to be considered by all the parties.⁴

10. In this case, according to the proofs, the plaintiff appears to have been a volunteer, or one who was not employed to act as he was acting when the accident occurred; if the jury believe that the plaintiff was thus a volunteer, their verdict should be for the defendant.

Answer: If, gentlemen, the plaintiff was merely a volunteer he cannot recover in this case. A volunteer is one who assists in work of this kind without an interest in it, and without any duty upon his part to do so; say, for instance, if a friend of Mr. Donovan or Mr. Harvey, whom they passed on the street, got on this wagon with them and went to Mr. Blessing's and assisted in unloading this wheel, Mr. Rickards would not have been responsible; or, if Mr. Kuhn, who was going to his dinner from Fourth and Montgomery Avenue, had assisted, he being a stranger and there being no duty on his part, no one could be responsible to him. You will remember that, according to the testimony of the plaintiff, he was directed by his superior, Blessing's foreman, to assist in this work. The direction of that foreman, it was testified, was made by the request of Mr. Harvey, the defendant's foreman, who was working there.⁵

11. If a man who was merely a passer-by on this street, at the time of the unloading of this wheel, had chosen to stop to watch the operation of unloading and placing, not being employed or authorized to assist in any way, and whilst thus stopping and watching had been hurt by the fall of the wheel, he would not have been entitled to recover damages.

Answer: I affirm that.

12. Moreover, if the jury believe that the plaintiff was engaged by the defendant's men to act as he did, then likewise

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he cannot recover on account of the act or omission of one of his associates, and their verdict should be for the defendant.

Answer: I refuse to so charge. We must consider the word "engaged," in connection with all the testimony in the case. If he were employed with them, then he could not recover; but, if, having an interest or a duty in the matter, he was requested by them to assist, it does not take away his right to recover.⁶

15. Upon the evidence in this case the verdict of the jury must be for the defendant.

Answer: Declined.⁷

If Mr. Rickards is to be held here, it must be on the ground of the negligence of his workmen. Negligence is the want of care under the circumstances; a failure to act as careful men would have acted, as prudent men would have acted under the circumstances, in the same position. The conduct of these men in charge of the wheel is to be considered in the light of their surroundings at that time, as matters then stood, and not with a knowledge which we have now of the danger, unless it was apparently or reasonably to be apprehended by them as prudent and careful persons. . . .

Now, what are the facts? He, Mr. Rickards, intrusted the delivery of this wheel to careful, experienced persons, who had been in his employ for a number of years. They had safely raised this section of the wheel from the wagon and lowered it to the platform which had been erected by Mr. Blessing's men. When it was lowered to the platform, and was resting at a small angle against the other section of the wheel, which was between it and the wall, Mr. Harvey, who was standing on the wheel, unfastened the chain. Now, the only cause assigned by the plaintiff for its falling is that it was nearly perpendicular, with the greater weight below; and, when the chain was taken off, toppled over of its own weight, or that Mr. Harvey, in getting down, stepped upon the edge, and his additional weight threw it over. In either case, if it fell simply from the unfastening of the chain, or from Mr. Harvey's weight, you will consider whether such a consequence was to be reasonably apprehended. If this was merely an accident, resulting not from their carelessness, not from any act which, as prudent men, they should have guarded against, but merely an accident, no one is responsible here.

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There is another explanation of the cause of the falling of the wheel, which is suggested rather than proved by the testimony. It is this: Mr. Wiegner, who was Mr. Blessing's foreman, had been using a pry, as the wheel was lowered, to keep it out from the wall. It has been suggested that he continued the use of that pry when there was no longer any use for it, and after the chain had been removed. Another cause is, that the plaintiff, who had hold of a rope which was attached to that portion of the wheel nearest him, drew on it when the chain was taken off. These, gentlemen, are suggestions made in the argument of the case. It is for you to consider them, and give them what weight you consider proper. If this accident resulted from the negligence of the plaintiff himself; if there is any negligence on his part contributing to it, or if it resulted from the negligence of Mr. Blessing's foreman, then the defendant is not responsible. . . .

The jury returned a verdict in favor of the plaintiff for \$1,248. A rule for a new trial having been discharged, judgment was entered, when the defendant took this appeal assigning for error:

1-7. The answers to the defendant's points.^{1 to 7}

Mr. Wm. W. Wiltbank, for the appellant:

1. As it was the duty of Rickards merely to have the sections of the wheel delivered on the pavement, and as it was undisputed that Blessing had indicated a special manner of delivery, that is to say, upon a platform against his wall, it may reasonably be inferred that the control of the work at the stage when the accident happened was exclusively in Blessing through his foreman Wiegner, who called the plaintiff out and directed him to assist. If Blessing did not thus take charge of the delivery, the plaintiff, for the purposes of that delivery, was clearly either a co-employee with Rickards' men, or a volunteer. He certainly had no interest or right to be there, exclusive of the interest he had in his own employment. And by volunteering his services, under such circumstances, the plaintiff could have no greater rights as against the defendant Rickards, than would have existed had he been a co-employee with the others in Rickards' employ, in which case the defend-

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ant would not be liable : *Degg v. Railway Co.*, 26 L. J. Exch. 171; s. c. 1 H. & N. 773; *Potter v. Faulkner*, 21 L. J. Q. B. 30; s. c. 1 B. & S. 800. These cases are summarized in *Smith on M. & S.*, *247 (Text Book Series, 217). The first point of the defendant should therefore have been affirmed; and his third and tenth points should also have been affirmed without qualification.

2. But, even if the plaintiff was not a volunteer, no evidence of negligence causing the accident was shown on the part of the defendant Rickards. He was absent from the scene of the accident, and had given no instructions which, in their performance, had led to the injury. His men had been directed merely to carry the sections to Blessing's place and there deliver them. Not a single act of any one of those men was shown from which any negligence on his part could be inferred. They proceeded in a regular and orderly manner; and, as to the special disposition of the sections, they complied with the instructions of Blessing. How could it be held that Rickards, as an absent principal or master, became liable under such circumstances? And only one theory as to the cause of the accident involved any of Rickards' men, to wit, the presence of Harvey upon the section. But the testimony of the experts showed this theory to be absurd. So slight a scintilla of evidence of negligence should not have been submitted to the jury.

3. If there was negligence causing the accident, did it arise while Blessing and his men had control of the work? By the defendant's fifth point, the court was asked to instruct that if the jury believed that Blessing took charge of the delivery and placing of the wheel, and Rickards' men acted under his directions, in such case there could be no recovery against Rickards. The point was affirmed, but with a qualification that indicated clearly that the jury were to consider only the acts that Blessing did in person, and not at all what he did through his subordinates. Thus, the attention of the jury was called to the two acts on the part of Blessing as exclusively comprising all that he did on the occasion in question; but the point involved a consideration of what he did by his agents, as well as what he did himself. The qualification of the answer was error.

4. If the negligence did not arise under Blessing's manage-

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ment, did it arise while the plaintiff and the defendant's men were co-employees? Our twelfth point was to the effect that if the jury believed that the plaintiff was engaged by the defendant's men to act as he did, then he could not recover on account of the act or omission of one of his associates. Why should not the point have been affirmed as it stood? There was no magic in the word "engaged." The point did not indicate the distinction between engaged with the defendant's men and engaged by the defendant's men. Why should the court refer to it, and indicate that in the one case an interest or duty might entitle the plaintiff to recover, whilst in the other it might not? The plaintiff certainly had no interest or duty beyond earning his wages by his obedience to orders. If he were employed by Rickards' men, the same interest and duty existed as if he were requested by them to assist. It is respectfully submitted that the answer to the point was misleading.

Mr. E. H. Hanson (with him *Mr. E. F. Hoffman*), for the appellee:

1. The plaintiff was not a volunteer, or in the status of a co-employee with the workmen of the defendant. He was assisting to receive the goods of his own master, under orders from his superior. (1) The two sets of men were working under a distinct and separate direction; (2) each director was employed by a separate master; (3) and, finally, the work of each was entirely different. Mere co-operation or community of labor and ultimate purpose is not enough to make men fellow-servants. They are not fellow-servants unless they are all under the control and direction of a common master. The rule that a servant assumes the risk of the negligence of a fellow-servant, is based on the theory that a workman considers the character of the men employed by the master with whom he contracts, when he agrees to work for him. There can be no co-employment with a stranger, except the implied co-employment of a volunteer. The plaintiff and the defendant's servants not being under the same control, or forming part of the same establishment, there was no co-employment, and the plaintiff was entitled to recover: *Abraham v. Reynolds*, 5 H. & N. 143; *Wright v. Railway Co.*, 1 Q. B. Div. 252.

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2. "To constitute servants co-employees, it is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose:" PAXSON, C. J., in *Lewis v. Seifert*, 116 Pa. 646. See, also, *Keystone Bridge Co. v. Newberry*, 96 Pa. 246; *Lehigh V. Coal Co. v. Jones*, 86 Pa. 432. It is therefore necessary, to constitute co-employment, that the servants should contract with and work for a common master. That was not the case here. In *Degg v. Railway Co.*, 26 L. J. Exch. 171; s. c. 1 H. & N. 773, cited by the defendant, Degg the plaintiff was receiving goods at a siding of the company. Some railroad hands were attempting to turn a track on a turntable near by. Degg, observing they were having difficulty, "called out to them to stop and he would help them." He then went to their assistance, and while pushing was injured. He was indisputably a volunteer. In this case it is equally clear that the plaintiff was acting under orders.

OPINION, MR. JUSTICE GREEN:

This case is an exceedingly close one, highly exceptional in its facts, and apparently without a precedent among the authorities. The defendant was delivering a heavy fly-wheel, weighing five thousand pounds, to a Mr. Blessing, at the factory of the latter. The wheel was divided into two equal sections, and the first of them had been delivered on the pavement in front of Blessing's factory in the morning. Blessing's men, under his direction, had put up a scaffolding as high as the door-way leading into the building, about two feet high, and had raised the section already delivered, up nearly to the top of the scaffold, when Rickards' men returned with the other section and insisted upon unloading it at once. The first section was then dropped down, and the chain taken off and fastened to the second section, and it was raised clear of the wagon and over the scaffold. Some difficulty was experienced with the rope and chain, and the section was dropped till it rested on the scaffold and against the wall. While in that position, Harvey, Rickards' foreman, climbed up on the wheel and loosened the chain and stepped down on the rim of the wheel, and it was claimed by the plaintiff his weight on the rim caused the wheel to topple over and fall on the plaintiff and injure

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him. It was testified by Weigel, as well as by Wiegner, Blessings' foreman, that while the wheel was being moved, just about the time the chain became tangled, Harvey called for help, and Wischam was either called for by Wiegner, or he happened to be on the ground, and he assisted in moving the wheel. Wiegner and Weigel were Blessing's men, and they were assisting, and when Wischam came up he was told, as he testifies, by Wiegner to catch hold of the chain. He does not say whether he did so or not, nor does any other witness say what he was doing at the moment of the accident, but they all say that when the wheel fell he was under it. There was a lack of definite statement on this subject, and it does not appear that the attention of the witnesses was called to it in their examination. However, it is a fair inference that Wischam was called by Wiegner to assist, and that he did assist in some way, or was present for that purpose when he was injured. Wischam says Wiegner called to him to come out and help, and told him to take hold of the chain. Wiegner says he don't recollect calling him, but that he saw him around, and that he did help. As the court charged the jury that if Wischam was a mere volunteer he could not recover, we will have to assume that the jury believed his statement that he was directed by Wiegner, who was his boss or foreman, to help, and did help in consequence of that direction. The case, on its facts, then, stands thus: Wischam, being one of Blessing's men, assisted in moving the wheel at the instance of Blessing's foreman, who called for him by the request of Harvey, Rickards' foreman, and received his injury whilst rendering assistance in these circumstances. The case, or rather the question of Rickards' liability, is complicated by the fact that the movement of the wheel was a joint movement in which both Blessing and Rickards were interested, and by the fact that Wischam acted under orders from his own foreman. Rickards was certainly not bound to put the wheel inside Blessing's building. His delivery would have been complete when delivery on the pavement or on the scaffolding was made. The first section was completely delivered when it was deposited on the pavement. But Blessing wanted the wheel in the building, and while the men were all there, that was what they were trying to do, and in that act all the men were participants. It is true the delivery from

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the wagon on the platform was not quite completed when the accident happened, and, therefore, we think it must be regarded as having happened while the defendant's men were performing their act of delivery.

Now, it is perfectly clear that if the plaintiff was a mere volunteer, that is, assisted entirely of his own motion, by his own voluntary proffer of service, the defendant would not be liable. All the authorities are that way, and so the court charged the jury. The question is, if he assisted at the request of the defendant's servant, or in consequence of such request, is the defendant liable? There are two cases, one of which was cited in the paper-books, which have a very important bearing on that question. One of them is the case of *Potter v. Faulkner*, 101 E. C. L. R. (1 B. & S.) 800. The defendant's porters were lowering bales of cotton from the defendant's warehouse and his carter was receiving them into his lorry (small wagon). The plaintiff, who was waiting with a lorry to receive a load of cotton for his master, at the request of the defendant's carter assisted him, and in consequence of the negligence of the defendant's porters a bale of cotton fell upon and injured him. Held, that the defendant was not liable to an action. In the report of the case the following facts are stated amongst others: "The lorry which was being loaded at the time of the accident was the property of the defendant, and the parties above and the carter below were his servants, of which the plaintiff, before the accident, had notice. The carter of the defendant's lorry, which was being loaded in the manner before mentioned, requested the plaintiff, who was waiting with his master's lorry for his turn, to help him to move into their proper places in his cart the bales which were being lowered for him. The plaintiff thereupon got upon the defendant's lorry and was assisting him when the accident happened." The court, ERLE, C. J., said: "The plaintiff intervened to assist the servant who was in the cart, and, so far as the master was concerned, was a volunteer upon the occasion and was injured by what was found to be negligence in the defendant's servants in the warehouse. The question is, can the plaintiff, under the circumstances, sue the master for the negligence of his servants? This is the case of one who volunteers to associate himself with the defendant's servant in the performance

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of his work, and that without the consent or even the knowledge of the master. Such an one cannot stand in a better position than those with whom he associates himself, in respect of their master's liability: he can impose no greater obligation upon the master than that to which he was subject in respect of a servant in his actual employ; and it is clear law that the master would not have been liable if the servant below had been injured by the negligence of the servants above. As between master and servant, the duty of the master is to take due care to employ other servants of competent skill and ordinary carefulness; when he has done that, he has done his duty as between himself and his servants, and we are of opinion that the liability contended for by the plaintiff does not attach to an employer."

It will be perceived that the court considered the plaintiff to be a volunteer, notwithstanding he intervened only at the request of the defendant's servant. Now, while it may seem a little strained to call such a person a mere volunteer, the reason given for the non-liability of the master is more substantial, to wit, that the plaintiff's act of associating himself with the defendant's servant, in the performance of the work, was done without the knowledge or consent of the master, and therefore he could acquire no better position than that of the servant with whom he associated himself.

The other case to which reference has been made is *Flower v. Penna. R. Co.*, 69 Pa. 210. In that case, a locomotive being at a water station in the city of Lancaster, the fireman asked a boy ten years old standing there to turn on the water. Whilst he was climbing on the tender to put in the hose, the remainder of the train came down with the ordinary force and struck the car attached to the engine; the jar threw the boy under the wheels and he was killed. In an action by the parents for his death it was held that the company was not liable. AGNEW, J., in delivering the opinion, said: "The true point of this case is that in climbing the side of the tender or engine at the request of the fireman, to perform the fireman's duty, the son of the plaintiff did not come within the protection of the company. To recover, the company must have come under a duty to him which made his protection necessary. Viewing him as an employee at the request of the fireman, the relation

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itself would destroy his right of action: *Caldwell v. Brown*, 53 Pa. 458; *Weger v. Penna. R. Co.*, 55 Pa. 460; *Cumberland V. R. Co. v. Myers*, 55 Pa. 288. Had the fireman himself fallen in place of the boy, he could have had no remedy. It does not seem to be reasonable that his request to the boy to take his place, without any authority, general or special, can elevate the boy to a higher position than his own, and create a liability where none would attach had he performed the service himself."

The very important proposition, declared in this case, is that the servant of the company cannot impose a higher liability upon it than it was under to himself, by any act of his, and that the person rendering assistance in the service of the company, at the request of its servant, can have no other or different remedy against the company than the servant himself had. It seems to be a reasonable doctrine, founded in sound principles, and it has received full judicial sanction in the two cases cited.

Degg v. Railway Co., 1 H. & N. Exch. 773, was the case of one who was a pure volunteer, but the reasoning of the opinion is in conformity with the same doctrine. *BRAMWELL, B.*, thus states the facts and decision: "The defendants were possessed of a railway and carriages and engines; their servants were at work on the railway in their service with those carriages and engines; the deceased voluntarily assisted some of them in their work; others of the defendants' servants were negligent about their work, and by reason thereof the deceased was killed; the defendants' servants were competent to do the work; the defendants did not authorize the negligence. We are of opinion that, under these circumstances, the action is not maintainable. The cases show that if the deceased had been a servant of the defendants, and injured under such circumstances as occurred here, no action would be maintainable; and it might be enough for us to say that those cases govern this, for it seems to be impossible to suppose that the deceased, by volunteering his services, can have any greater right or impose any greater duty on the defendants than would have existed had he been a hired servant."

It will be seen that the fundamental idea of the reasoning is that the volunteer can have no greater rights than those servants have who are engaged in the service in which he joins;

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and it is not so much because he is a volunteer as because he makes himself one of a class, who, as against their masters, have no right of recovery for each other's negligence. This appears plainly enough from another consideration. If a servant is paid for his service, of course he has only the rights of associated servants, and those do not include a right of recovery for the negligence of a fellow-servant. Why should he have a higher right where he is not paid? Baron BRAMWELL, meeting this idea in the case cited, says: "But we were pressed by an expression to be found in those cases to the effect that 'a servant undertakes, as between him and the master, to run all ordinary risks of the service, including the negligence of a fellow-servant:' *Wiggett v. Fox*, 11 Exch. 832, and it was said there was no such undertaking here. But in truth, there is as much in the one case as in the other; the consideration may not be as obvious, but it is as competent for a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid, he will take care of himself from the negligence of his fellow-workman, as if he were paid for his services."

It is manifest, therefore, and is perfectly well settled law, that one who is engaged in the service of a common master, and in a common employment, cannot recover against the master for the negligence of a fellow-servant, whether he is paid for his service or not. Now, the cases of *Potter v. Faulkner* and *Flower v. Railroad*, first above cited, are full authority for the further position, that if the stranger joins in the service at the request of one of the servants of the master, he is in no better position than a mere volunteer.

In the present case, the plaintiff's intervention in the service in which he was injured was induced by the order of his own superior, and the learned court below thought, and so held, that he could not be regarded as a volunteer, but rather as in the performance of a duty. At first blush this seems very forcible and quite reasonable, and it had much weight with the writer until a thorough study of the subject, and of the authorities, led him to a different view. As I regard the matter, the cases teach us that it is not because the associated servant is a volunteer that he is denied redress for the negligence of a fellow-servant, but because it is the well-established law of the

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relation between the servants whom he joins, and their master, that there is no such liability on the part of the master. Hence, by joining them in their common service, he becomes, as to the master, one of them, with the same rights and duties as to the master, but with no higher rights as against him. Certainly, without his consent he cannot reasonably be subjected to a greater obligation, by the act of one of his servants in engaging the service of another, than he is under to that servant. If this be so, as was held in the cases cited, how does it matter in what manner the request of the defendant's servant was communicated to the plaintiff? Let it be that it came in the form of an order from his own superior, and that he was in duty bound to obey that order. It was still only done at the request of the defendant's servant, and the question we have to decide is the liability of the master. We have seen that his liability cannot be increased, without his consent, by the act of his servant, and it is that reason which is fundamental in the discussion which demonstrates his freedom from obligation for his servant's act. But if this is the determining reason of the argument, it is just as applicable where the servant's request is communicated through, or made the basis of an order by a third person to the plaintiff. It is very plain, for that is decided, that if Wiegner, who was Wischam's superior, had himself joined the service at the request of Harvey and been injured, he could not have recovered. How then can he confer upon Wischam, who is at best only his representative, a right of action against Rickards which he did not possess himself? We cannot see. It may be true that Wischam was subject to a duty to obey Wiegner, but that was no duty to the defendant; it was no duty to which the defendant had any relation whatever, and it is only the defendant's obligation that is in question here.

We cannot think, therefore, that the defendant's liability was in any manner increased by the fact that Harvey's request for assistance was answered by Wischam's joining in the service in consequence of an order from his superior. It was still only a participation by Wischam in an associated service, the law of which excludes him from compensation to be recovered from the master for the negligence of his associates.

There is, however, a feature of the subject which requires

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consideration, and it is that which makes this case so exceedingly close. It is illustrated in the case of *Abraham v. Reynolds*, 5 H. & N. Exch. 142. There the plaintiff, a servant of I. & Co., who was employed by the defendants to carry cotton from a warehouse, was receiving the cotton into his lorry when, in consequence of the negligence of the defendants' porters, in lowering the bales from the upper floor of the warehouse, a bale fell upon him. Held, that the plaintiff and the defendants' servants, not being under the same control or forming part of the same establishment, were not so employed upon a common object as to deprive the plaintiff of a right of action against the defendants for such negligence. The facts found by the assessor were that the plaintiff went to the warehouse of the defendants to receive cotton bales into his wagon and carry them to his employers; that the cotton was in a room on the fifth floor, and was lowered by the defendants' servants into the lorry below. The plaintiff brought his lorry under the warehouse and received three or four bales, when one of the defendants' men called to him to pull in a bale; while he was doing so another bale fell upon him from above. It was argued that there should be no liability on the part of the defendants, the owners of the warehouse, because the plaintiff was engaged in a common service with the defendants' servants. But the court held otherwise, substantially on the ground that the plaintiff was merely acting for his own master, and was necessarily present for the purpose of receiving the cotton, and therefore had no relation with the defendants. POLLOCK, C. B., said: "When two persons serve the same master, one cannot sue the master for the negligence of his fellow-servant. The rule applies to every establishment. No member of an establishment can maintain an action against the master for an injury done to him by another member of that establishment, in respect of which, if he had been a stranger, he might have had a right of action. . . . Here it is said that there was common work. If it was agreed that this work should be done by all, the rule might apply; but it does not apply merely because the parties had a common object, if they had separate ends, and for some purposes, antagonistic interests. There, as in a case, put by my brother MARTIN during the argument, of warping a vessel into a dock, mariners

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at one end and dock laborers at the other, dragging at a rope, either party would be entitled to bring an action for an injury received in consequence of the negligence of the others. It is carrying the matter too far to say that the mariner would have no right of action against the employer of the dock laborers if injured by the negligence of the latter. They have different objects and different liabilities." This reasoning clearly illustrates the grounds of the decision. The plaintiff was merely receiving the cotton as the agent of his own master, and while doing so was injured by the negligence of the warehouseman's servants. There was no community of service, as each was in the employ of a different master.

Another case of a similar kind is that of *Wright v. Railroad Co.*, L. R. 1 Q. B. Div. 252. There the plaintiff shipped a heifer in a box-car of the defendant's road, and took passage on the same train himself. On arriving at the station, the car was shunted to a siding to get the heifer off. There were only one or two porters available to shunt the box-car, and the plaintiff assisted in shunting the car to the side track to get the heifer off, and while doing so the box-car was run into by a train, which had been negligently allowed by the defendant's servants, and the box-car was driven against the plaintiff and seriously injured him. It was held the defendant was liable for the injury, because the plaintiff was not acting merely as a volunteer, and he was not a fellow-servant, but only assisted in the delivery of his own goods, on his own behalf. Lord COLERIDGE said: "It is plain that the plaintiff was not acting merely as a volunteer, in which case he would have been bound to take all the risks upon himself which he met with in the employment. Nor was it the case of master and servant, in which case the defendants would not have been liable for the negligence of a fellow-servant. But the defendants being bound by contract to deliver the heifer to the plaintiff, they by their representative, the station master, allowed the plaintiff to take part in the delivery, and they were therefore bound to see that he did not get injured by the negligence of their servants." CLEASBY, B., said: "It is said that as the plaintiff was assisting the defendants' servants he became a fellow-servant. But this distinction makes no difference, for this reason: persons who engage in work with fellow-servants are said to take

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the chances of the sort of negligence which they themselves or their fellow-servants may be guilty of. Is the plaintiff here in the position of a fellow-servant? The plaintiff was in that position in *Degg v. Railway Co.* and in *Potter v. Faulkner*. But he is not so here. He has not agreed to be the fellow-servant of the defendants' servants. But, according to a usual practice, he has assisted in the delivery of his own goods on his own behalf, not as a servant of the company."

These citations indicate the grounds upon which the decision was put, and they are in substance that the plaintiff had a right on his own behalf to be present and aid in the delivery of his own goods, without thereby assuming the relation of a servant to the defendant. In the present case that was not the fact. The plaintiff did become one of the servants of the defendant, to assist in the defendant's act of delivering the wheel. He was so acting in response to the request of one of the defendant's servants; he had no right or interest in the wheel or its delivery, and what he did was done on behalf of the defendant and in conjunction with the defendant's servants. The delivery was not completed, but was going on when the accident occurred, and the delivery was the act of the defendant. The participation of the plaintiff was not that of an owner receiving his own goods, but was that of a servant assisting the servants of the defendant, and this circumstance brings it within the rule of non-liability. The distinction is refined, but it seems to be substantial, and we feel constrained to recognize it and enforce it.

Judgment reversed.

Statement of Facts.

COMMONWEALTH EX REL. v. E. H. FITLER.

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APPEAL BY RELATOR FROM THE COURT OF COMMON PLEAS
NO. 4 OF PHILADELPHIA COUNTY.

Argued January 29, 1890—Decided October 6, 1890.

[To be reported.]

1. The writ of mandamus is not a proper remedy, except when there is a clear legal right in the relator, a corresponding duty in the defendant, and the want of any other adequate, appropriate and specific remedy: Commonwealth v. Pittsburgh, 34 Pa. 496; Lehigh Water Co.'s App., 102 Pa. 515.
2. The certification, as a municipal ordinance, of a bill which was vetoed by the mayor and failed to pass over his veto, will not be compelled by mandamus, on the ground that the veto message was ineffective because sent by mistake to the wrong chamber of councils; its validity cannot be decided in this summary manner.
3. So far as § 4, act of May 23, 1874, P. L. 231, relating to the government of cities, requires the mayor to return a vetoed ordinance to councils within ten days, it is mandatory; but the provision that it shall be returned to the branch of councils wherein it originated, is merely directory: Per PAXSON, C. J.
4. Under the practice prevailing in the city councils of Philadelphia, it seems that a bill introduced into the common councils, referred without consideration to a joint committee, reported by it to select council of which its chairman is a member, and first passed by that body, originates therein, within the meaning of said act.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, McCOLLUM and MITCHELL, JJ.

No. 57 January Term 1890, Sup. Ct.; court below, No. 609 March Term 1889, C. P. No. 4.

On May 11, 1889, upon petition of the Northeastern Rapid Transit Railway Company, the court below awarded an alternative writ of mandamus directed to Edwin H. Fitler, mayor of the city of Philadelphia, John Eckstein, clerk of the common council, and Joseph H. Paist, clerk of the select council, of said city, commanding the defendants forthwith to furnish to the relator a copy, duly certified in accordance with the provisions of the act of March 21, 1866, P. L. 262, of an ordinance

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granting the consent of the city to the construction by the relator of a railway upon certain streets, or, in default thereof, to make known why, etc.

On May 25, 1889, the defendants filed a return, to which the relator on June 1, 1889, demurred, the facts, as admitted by the pleadings, being in substance as follows :

On May 17, 1888, the ordinance in question was introduced into the common council, by being read in place by Mr. Maloney, a member; and thereupon it was referred, without consideration, to the committee on law. That committee was a joint committee, composed of members of each of the two branches of councils, its chairman being a member of the select council. The committee reported it with a favorable recommendation to the select council, and on October 18, 1888, after consideration and amendment, it was passed by that body. It was then sent to the common council, and for the first time received consideration therein. After amendment it was passed and sent back to the select council, which finally passed it, as amended by the common council, on February 7, 1889. The bill was designated in the journal of each chamber as Select Council Bill No. 81. On February 9, 1889, an engrossed and certified copy of it was presented to the mayor by the clerk of the select council. The mayor returned it to select council, with his objections, on February 21, 1889, at the first meeting held after the expiration of ten days from the date of final passage. On the same day, the select council voted upon the question whether the bill should be passed notwithstanding the mayor's objections, and nine votes were cast in favor of its passage and twenty against.

After argument upon the demurrer, the court, WILLSON, J., delivered an opinion in part as follows :

There are many technical questions raised by the demurrer filed by the relator, but it would be profitless to discuss any but the substantial question involved in the case. This arises upon the relator's own statement of its case, as embodied in the petition and writ; and the demurrer, therefore, upon familiar principles of pleading, properly brings it to the consideration of the court. Indeed, the argument of the case included no other subject. . . .

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The relator claims that the bill became an ordinance by reason of the fact that the mayor did not send his message of disapproval to the body, where, as it is alleged, the bill originated. The whole ground upon which the relator stands is found in the fourth section of the act of May 23, 1874. That act provided for the three-fold classification of cities, and, among other things, gave somewhat minute directions in regard to the method of municipal legislation. The third section contained requirements relative to the consideration of bills by councils. In the fourth section it was enacted as follows, viz. :

“The mayor shall sign said resolution or ordinance if he approve it, or return the same to the branch of councils wherein such resolution or ordinance originated, within ten days, or at the next meeting of councils after ten days have expired, if he does not approve it, with the reasons therefor; and if thereupon each branch of councils pass the same within five days of such veto, by a vote of three fifths of all the members elected to each branch, it shall become effective as though the mayor had signed the same; it shall equally become effective if he should neglect to return the same within such ten days.”

—The court here recited the history of the bill in detail, and then continued :

Under these circumstances, the relator contends that the bill became an ordinance or a law, because, according to the relator's position, it was the duty of the mayor to return the bill, when he disapproved it, with his reasons, to common council, where it is said to have originated, and not to select council, which first considered and passed it. Upon this theory of the case, we are asked to direct the clerks of councils and the mayor to certify to the bill, whose history has just been recited, as an ordinance, in order that the relator may exercise the rights and privileges which would belong to it if the bill actually became an ordinance.

We will not take time to discuss the question raised by the defendants as to whether or not a mandamus could properly be issued to direct such officers to certify to a particular legal result from their acts or omissions. In a clear case; for instance, if the mayor should fail to send his disapproval of a bill submitted to him within the time prescribed by the act of assembly, it might be and probably would be our duty to direct

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that the certificate now asked for should be given. Nothing, however, is better settled, in regard to the writ of mandamus, than that it will not be awarded when the relator's legal right is not clear, in any case: *James v. Commissioners*, 13 Pa. 72; *Commonwealth v. Commissioners*, 5 R. 75; *Easton v. Water Co.*, 97 Pa. 554; *Commonwealth v. Councils*, 84 Pa. 496; *High on Mandamus*, *11.

Can it be fairly said that, in this case, the relator has established a clear legal right to assert that the bill in question became operative as a law, and to enjoy the benefits which, if it did, it would have conferred? If so, we should regard it to be our duty, under our present impressions of what the relator's position would then be, to award the writ of peremptory mandamus. But we are compelled, by the circumstances which have already been detailed, to hesitate at this point. No doubt it is true that our municipal legislation and legislative procedure ought to be in substantial accordance with the requirements of the acts of assembly on the subject, and the act of 1874 is now the chart to be followed. There may, however, be provisions of the act which are merely directory, and, therefore, not so vital as to invalidate what may be done not in absolute conformity therewith. We do not decide that the statutory provision that the mayor's disapproval of a bill should be returned to the branch of councils in which it originated is of that character. It is not necessary to decide it, and the question may remain open. But what would be said, if the mayor should address his message of disapproval to the select and common councils, as we are informed he did in this case, and his messenger, by mistake, or through corrupt inducement, should return the document to the wrong branch, contrary to orders given by the mayor?

In the matter in hand, we are asked, upon a strict construction of the legislative mandate just referred to, to sustain the right of the relator, notwithstanding it must be obvious that, by so doing, we would not only be compelled to hold that the mayor failed of perfecting the intended veto by reason of his inferring, as anybody else would have done, that the bill originated in the branch whose name it bore, viz., select council, but we must also give legal effect as an ordinance to the bill, when the record shows that only one third of the select council

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supported it, after the mayor's objections were heard. In other words, by so doing, we would hold the city to an obligation, and, possibly, to a burden, of indefinite continuance and magnitude, when it appears, taking the whole case together, that the final and mature judgment of both branches of the people's representatives never harmonized in the assumption of such a load. Moreover, any such ruling by us would evidently be contrary to the whole conduct and understanding of councils in the consideration and original passage of the bill in question. Both bodies treated the matter in all their deliberations as a select council measure.

We cannot, therefore, avoid the conviction that we would err, if we should be astute in trying to find a foundation on which to build a structure to sustain the relator's claims. At the same time, if the true and necessary view of the case requires that all such considerations shall be ignored, notwithstanding the private corporation might gain to the disadvantage of the public, we would, of course, have no right to refuse to extend the arm of the law and afford to the relator the relief which it asks. Fortunately, we think, in the interest of a sensible and rational administration of the law, we are relieved from any such necessity.

To sustain our conclusion, it would only be essential that it should appear that the relator has not established a clear legal right in the premises. As previously stated, the mandamus cannot properly be issued, in the absence of such right. We are prepared, however, to go further than merely to say that the right is doubtful. In our opinion, the relator has no right, under the bill which the mayor disapproved.

It is true that the original draft of a bill, out of which the final measure was developed, was first introduced into common council. In a sense, if not within the meaning of the statute, it may, perhaps, be said that the bill "originated" there, because of the mere fact of the introduction of the bill at a meeting of that body, as the first step in its history. At least, it may be said that, in a certain sense, it originated with the member of that body who offered it. As previously stated, however, the bill received no consideration in common council; indeed, it could then receive no consideration there, under the provisions of the act of May 23, 1874, but was sent to a committee, which reported it to select council.

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At this point arises a difficulty in the way of the relator, which was suggested by the court to counsel at the argument, and which grows no less formidable upon further consideration. If we should take the strict construction of the law which is necessary, in order that the mayor's intended veto shall be held to be of no effect, what would we say as to the effect of the committee's transmitting the bill into select council, instead of into common council, from which it went to the committee? The statute, § 3, directs that "no bill shall be considered unless referred to a committee, and returned therefrom and printed for the use of the members." How can it be said with any propriety, according to the usual significance of language, that the bill was "returned," when it was sent to another branch of councils from that which sent it to the committee? To "return" anything which has been received is, plainly, to hand it over, or deliver the thing, to the person or body from whom it came.

The practice of councils in this regard, if this case affords a sample of it, is well worth serious consideration by those bodies. In this particular case, however, the relator cannot be helped by any habit of councils to deal with bills in such a manner, for it will hardly be contended that these municipal bodies can abrogate a statutory enactment by establishing a contrary custom. We are, therefore, not able to perceive how, if we should adopt the relator's extreme and technical position in interpreting the act in its application to the case in hand, we would avoid finding an insuperable obstacle to its success in the fact that the bill was improperly and illegally reported by the committee to select council, and, consequently, that it never acquired vitality afterwards.

Passing this point, however, it is to be noticed that select council was the first of the two branches to take the bill into consideration, and that the bill was there amended and passed, before common council had really any important connection with the matter. It seems to us that there is no impropriety in regarding that bill which thus came from select council—a different bill, in fact, from that which was introduced into common council—as "originated" in select council, in the ordinary, legislative sense. It certainly cannot be said that the bill went from the common to the select branch, in the first

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instance. That could not have been accomplished without its passage by common council, which did not occur until after the select branch had passed it. It was the body which first put its sanction or approval upon the measure by passing it, which can, in the full sense, be said to have originated the bill.

The fact that the bill was treated by both branches as a select council bill, shows that, practically, it was regarded as having been originated in the latter body. Substantially, this was the fact, notwithstanding the peculiarities of the course of legislation give a measure of plausibility to the claim that the origin of the bill was in the other branch. It is with the substance of the matter with which we ought to deal, and we think that, in view of the history of the proceeding before councils, which has been detailed, when the mayor found that the bill submitted to him had been treated by both branches as a select council bill, he was justified in regarding it as having originated in the body to which he sent his message of disapproval, and that, substantially, for all purposes which the statute may be supposed to have been intended, he was right.

It would be a strange anomaly, if, notwithstanding the two municipal bodies were agreed to regard and treat the bill as having come from, or, which is the same thing, as having originated in one of them, a person or corporation, like the relator, should be able to contend with success that their actual, practical dealing with the subject is to be entirely ignored, and that most serious and important privileges, involving, possibly, great injury to private interests, are to be regarded as having been conferred by the city authorities, contrary to the final expressed judgment of one of the legislative bodies, and without any dissent or allegation of usurpation by the other, to which, it is said, the veto message should have been sent.

If the bill had been introduced precisely as it was into the common council on May 17, 1888, and had slumbered in the joint committee, and on the 9th of July, because of the delay, a bill in the same terms had been introduced into the select branch, been referred to the same committee and then back to select council, and had taken the same course subsequently which the bill before us took, it would hardly have been claimed that it originated in common council. The two cases are not precisely parallel, but are they not sufficiently so to illus-

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trate the vice and essential weakness of the relator's position in this controversy?

We have thus, with abundant fulness, stated the grounds upon which we rest our conclusion that the relator has failed to make out its case.

It is hardly necessary to say that we have nothing to do with the question of the expediency of giving to the relator the consent which it asked. That is entirely within the province of the municipal legislature. The question, whether or not that consent was given by the original passage of the bill referred to, notwithstanding the mayor's efforts to veto it, has, of course, been involved in what we are called upon to decide, although it is not the specific issue before us.

The demurrer is overruled, and judgment will be entered in favor of the defendants.

—Thereupon the relator took this appeal, specifying that the court erred:

1. In entering judgment in favor of the defendants, on the demurrer.
2. In not entering judgment for the relator on the demurrer.
3. In refusing to award a writ of peremptory mandamus.

Mr. S. S. Hollingsworth and *Mr. George W. Biddle* (with them *Mr. H. N. Paul, Jr.*, and *Mr. Fred. B. E. Esler*), for the appellant:

1. This bill originated in the common council within the meaning of § 4, act of May 23, 1874, P. L. 231, providing that a bill passed by councils shall become effective as an ordinance unless the mayor, within ten days, shall return it with his objections to the branch of councils in which it originated. The word originate, in parliamentary use, always refers to the first introduction of a bill into a legislative body: May on Parl. Pr., 466, 467; Stephens' Com., 383, 385; Halcombe on Private Bills, 78; Bourinot on Parl. Proc. in Canada, 564, note 5; 3 Hatsell's Prec., 62, 807; May on Parl. Law, 471-479; Wilson's Dig. of Parl. Law, § 435; Cushing's Manual, §§ 2, 203; Jefferson's Manual, 53; Rule 29 of U. S. Senate; Rule 25 of Common Council of Philadelphia; 9 Cong. Deb., 477, 722; Cong. Globe, 3d Sess. 41st Cong., part III., 1717. In some of the state constitutions it has been used as synonymous with intro-

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duce: Mich. Const. of 1850, article IV., § 28; § 18, article II. of Const. of Tenn.; § 29, article IV., Const. of Mo.; and it has been so used in judicial decisions: *Day Land etc. Co. v. State*, 68 Tex. 526; *Opinion of the Justices*, 126 Mass. 547; *Moody v. State*, 48 Ala. 115 (17 Am. Rep. 28); *Jones v. Hutchinson*, 43 Ala. 723; *Hull v. Miller*, 4 Neb. 503; *People v. Devlin*, 33 N. Y. 269 (88 Am. Dec. 377).

2. Our own constitution, the constitutions of other states, and the act of May 23, 1874, under which this case arises, all contain the provision that the original purpose of a bill shall not be changed by amendment. It is obvious that the original purpose can only be the purpose of the bill at its origin, and this provision would be defeated if it were held that the bill originates at the time of its first passage in one of the branches of the legislature. It is uniformly held that the original purpose is that which the bill has at its introduction: *Stein v. Leeper*, 78 Ala. 519; *Hall v. Steele*, 82 Ala. 562. Moreover, in § 11, act of May 23, 1874, the word *originate*, is plainly used as the equivalent of *introduce*, and the rule is that the clear meaning of a word in one section of an act will control its meaning, if doubtful, in another. Under the provisions of § 3 of the same act, regulating the reference of bills to committees, and under the joint rules of the councils, which provide that the reading of the title, by a member in place, before any reference, shall constitute the first reading, it is clear that this bill originated in the common council and had started upon its passage, before the select council had anything to do with it. The court below was in error in saying that the councils treated this as a select council bill. The clerk in his minutes does so refer to it, but the councils are not responsible for his language.

3. The object of the provision that the bill must be returned to the branch of councils wherein it originated, is that the objections of the mayor, if inconclusive, may be met and answered in the chamber in which the introducer and champion of the bill has his seat. That provision is mandatory: *Opinion of Justices*, 3 Mass. 567; *Harpending v. Haight*, 39 Cal. 189 (2 Am. Rep. 432); *Appendix to N. Y. Laws, 1881, vol. I., p. 943*; *Penna. Globe G. L. Co. v. Scranton*, 97 Pa. 538; *Truesdale v. Rochester*, 33 Hun 574. There are two reasons for that rule: (1) that the veto power is in derogation of the sovereign power

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of the legislature, and therefore can exist only when expressly granted: *Burlington v. Dennison*, 42 N. J. L. 165; *Philadelphia v. Given*, 60 Pa. 136; *Blanchard v. Bissell*, 11 Ohio 103; and (2) a grant of authority in a municipal charter must be followed strictly in the mode of its exercise: *Zottman v. San Francisco*, 20 Cal. 96 (81 Am. Dec. 96); *Keys v. Denver*, 10 Col. 113; *Head v. Insurance Co.*, 2 Cranch 127; *Fuller v. Scranton*, 18 W. N. 18; *Bloom v. Xenia*, 32 Ohio 461; *Danville v. Shelton*, 76 Va. 325. The answer to the suggestion of the court below, that the veto may have been returned to the wrong chamber through the mistake or corrupt design of the messenger, is plain. It is the mayor's duty to see that his message gets to the proper house. Legislation has often been interfered with by negligence or wilful design of clerks and messengers: *Jones v. Hutchinson*, 43 Ala. 721; *State v. Deal*, 24 Fla. 293.

4. The validity of the ordinance is not affected by the failure of the clerk of common council to present it to the mayor in accordance with the ordinance of May 5, 1855, inasmuch as this was done by the clerk of the select council. The mayor and councils have power to disregard the directions of the ordinance of 1855, which is a mere rule of their own: *Kilgore v. Magee*, 85 Pa. 401; *Commonwealth v. Mayor*, 5 W. 155; *Speer v. Plankroad Co.*, 22 Pa. 376; and, moreover, its provisions are directory merely: *Bladen v. Philadelphia*, 60 Pa. 466; *Magee v. Commonwealth*, 46 Pa. 358; *Pittsburgh v. Coursin*, 74 Pa. 400; *McGraw v. Whitson*, 69 Ia. 348; *State v. Mead*, 71 Mo. 266. Nor does the fact that the committee, to whom the bill was referred by the common council, reported it to select council, invalidate the ordinance. It was in fact returned to the common council, although by an indirect path. The rules of the city councils provide that bills shall always be reported to the chamber of which the chairman of the committee is a member. One half of the present ordinances would be invalidated upon the interpretation given to the word return, by the court below. While the act of March 21, 1866, P. L. 262, does not expressly make it the duty of the mayor and clerks to certify ordinances, it impliedly does so by making certified copies legal evidence. The court may therefore compel the certification by mandamus: *Rex v. Staffordshire*, 6 A. & E. 99.

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5. The relator's franchises being dependent upon the consent of the city contained in this ordinance, the ordinance is part of its title, and it needs a certified copy as evidence of the right to exercise the franchises it claims. It has a sufficient interest, therefore, to entitle it to the writ of mandamus: *Rex v. Staffordshire*, 6 A. & E. 99. The remarks of the court below as to the necessity of establishing a clear legal right, are a correct statement of the law; but what is meant by a clear legal right? This is best answered by a reference to the cases cited by the court in support of the proposition: *James v. Commissioners*, 13 Pa. 72; *Commonwealth v. Commissioners*, 5 R. 74; *Easton v. Water Co.*, 97 Pa. 554; *Commonwealth v. Councils*, 34 Pa. 496. The result of these cases is that when the relator has not brought himself within the terms of the law, or the facts are doubtful, a clear legal right cannot be said to exist, but that when the right depends upon the interpretation of statutes, and they are construed by the court in his favor, a clear legal right is established. The relator's right in this case cannot be doubtful; it is clear or it does not exist, and it is for the court to say which is the case. The argument that the mandamus would compel the mayor to certify to a conclusion of law is fallacious: *Queen v. Mayor*, L. R. 4. Q. B. 110; *Queen v. Price*, L. R. 6 Q. B. 411; *Queen v. Holl*, L. R. 7 Q. B. 575.

Mr. Robert Alexander, Assistant City Solicitor, (with him *Mr. Charles F. Warwick*, City Solicitor), for the appellees:

1. In point of fact, as well as in point of law, the mayor made no mistake in returning the bill to the select council. It originated in that body, where it was first considered. There cannot be a legislative origination of that which has not been considered. In all the authorities on parliamentary law cited by the appellants, there is not one case, like the present, where the distinction between the words originate and introduce is made the subject of controversy. Under our peculiar system of municipal legislation they do not mean the same thing.

2. The relator has an adequate remedy without the aid of this writ of mandamus, as, if the city should endeavor to stop the construction of its road by injunction, it can have the validity of the ordinance decided in that suit. The proper remedy

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must be employed for the vindication of legal rights: *Sparhawk v. Railway Co.*, 54 Pa. 401; and a mandamus is not a proper remedy, except where there is a clear legal right, a corresponding duty of the defendant, and the want of any other adequate and appropriate remedy: *Commonwealth v. Councils*, 84 Pa. 496; *Easton v. Lehigh Water Co.*, 102 Pa. 515.

3. A mandamus cannot be used to obtain the opinion of the court on some doubtful question of law: *Schott on Mandamus*, 269. Moreover, the act of March 21, 1886, P. L. 262, in regard to certifying copies of ordinances, is not mandatory but permissive; it never was intended to compel the mayor and clerks to certify, in a case like this, to doubtful legal conclusions. According to the relator's own showing, the ordinance did not pass through the regular forms, not having been certified to the mayor by the clerk of common council; and there is no pretence that it was ever published in accordance with § 5, act of May 23, 1874, P. L. 232.

OPINION, MR. CHIEF JUSTICE PAXSON:

The exhaustive and interesting review of parliamentary law with which the learned counsel for the relator have favored us in their paper-book, has failed to convince us that the writ of mandamus prayed for should go out. It is possible that cases may arise in which it would be the duty of the mayor and clerks of councils to certify an ordinance, and that, upon their refusal to do so, the performance of such duty would be properly compelled by mandamus. But in this case we are asked to require them to certify, as an ordinance of the city, an ordinance which the record shows was vetoed by the mayor, and which subsequently failed to pass councils over his veto. We are asked to do this upon the bald technicality, as asserted by the relator, that the mayor by a mistake returned the ordinance, with the veto, to the wrong chamber; that is to say, he returned it to the select council, from which he received it as a select council bill, when he should have returned it to the common council, where the relator alleges it originated. This, it will be seen, raises the serious question whether it is a lawful ordinance; and the mayor and clerks of councils, neither of whom is learned in the law, are required by the relator to practically decide this question, or to do what amounts to the same thing, certify

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it as a lawful ordinance, under the provisions of the act of March 21, 1866. We do not think the validity of the alleged ordinance can be decided in this summary manner. The writ of mandamus was not intended for any such purpose. Such writ has never been held to be a proper remedy, except where there is a clear legal right in the relator, and a corresponding duty of the defendant, and the want of any other adequate, appropriate and specific remedy: *Commonwealth v. Pittsburgh*, 34 Pa. 496; *Lehigh Water Co.'s App.*, 102 Pa. 515.

This is sufficient to dispose of the case. We will say, however, in addition, that while it is true that the act of May 23, 1874, requires that the mayor shall sign a resolution or ordinance if he approve of it, or return the same to the branch of councils wherein such resolution or ordinance originated, within ten days, or at the next meeting of councils after ten days have expired, etc., yet we regard it as at least doubtful whether the ordinance in question originated in common council, within the meaning of this act. It is true it was first introduced into the common branch, and then referred to a committee, the chairman of which was a member of the select council. The committee reported it to the select council, which body passed it finally and then sent it to common council as a select council bill. The common council then passed it, and sent it back to the select council, the clerk of which certified it as a select council bill to the mayor, who returned it, with his veto, to that body. While the ordinance was first presented to common council, it does not follow as a conclusion of law that it originated there. In many of the parliamentary authorities and precedents cited by the learned counsel for the relator, the words "presented" and "originated" are used interchangeably, but the difference in manner of procedure between city councils and the parliament of England, the congress of the United States, and the legislatures of most of the states, has been overlooked. In most, if not all, of the last-named bodies, a bill when introduced in one house is never sent to the other, until after it has passed the body in which it was introduced. Hence, we can see why, in such cases, the words have been used interchangeably. But with councils it is different. The committee on law, to which this ordinance was referred, was a joint committee, composed of members of both branches,

Syllabus.

and when the committee reported it to the select branch, it became the ordinance of the latter, for all practical purposes. Common council paid no further attention to it, until it had been passed in the upper branch and sent to them. As an ordinance, it may be said to have had no existence, and hence not to have originated in either branch, until some action had been taken upon it.

So far as the act of 1874 requires the mayor to return an ordinance to councils within ten days, it is mandatory, and, by his failure to do so, the ordinance would be as valid as if he had signed it. But the direction to return it to the "branch of councils wherein such resolution or ordinance originated" is merely directory. That is a matter for the convenience of councils, and it is difficult to see how any injury to the public interests could possibly result from an error or oversight of this character. The main matter, the one in which the public are concerned, and the neglect of which might imperil the public interests, is the return of the ordinance to councils within the ten days; all the rest is unimportant detail.

So far from there being any serious irregularity in regard to this ordinance, we are of opinion, under the practice prevailing in councils, the mayor returned it to the proper chamber. The corporation, appellant, has not even the color of right in seeking to override the will of the municipality.

Judgment affirmed.

TRUST ESTATE FOR A. C. KUNTZLEMAN.

APPEAL BY CESTUI QUE TRUST FROM THE ORPHANS' COURT OF
PHILADELPHIA COUNTY.

Argued January 30, 1890—Decided October 6, 1890.

[To be reported.]

1. A trust merely for coverture will fall if there is no marriage, in fact or in contemplation, to support it, or, if the cestui que trust becomes discover by the death of her husband; and the circumstance that the trust imposes active duties upon the trustee will not prevent that result.

136	142
144	457
136	142
147	642
136	142
190	485
136	142
195	15
136	142
197	459
136	142
201	550
136	142
202	542
202	542

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2. But, when an active trust is created to give effect to a well defined, lawful purpose of a testator, in relation to his family, such as the preservation of the corpus of the estate for the benefit of the remainder-men who are to take by purchase, it will be sustained, whether the cestui que trust be sui juris or not.
3. To bring a devise within the Rule in Shelley's Case, the limitation in remainder must be to the heirs, in fee or in tail, as a nomen collectivum for the whole line of inheritable blood; wherefore, the rule does not apply to a devise of income to a daughter for life, with a limitation over to her heirs, exclusive of her husband and mother.
4. Perhaps under Yarnall's App., 70 Pa. 336, if the testator's intention was to create a separate use for the life-tenant, the exclusion of the husband alone would not have the effect of narrowing the line of descent; but the exclusion of the mother undoubtedly does so, and, accordingly, under such a limitation the remainder-men will take as purchasers.
5. Wherefore, when one of the purposes of a testamentary trust, with active duties in the trustee, is to preserve the corpus of the estate for the remainder-men taking under such a limitation, the trust will be upheld, even though the husband and mother of the cestui que trust have died since the death of the testator.
- (a) A testator directed that the income of property devised to a trustee for the benefit of his sons, should be paid to them during life "free from their debts," etc., and that the income of a trust devise for his daughter should be paid to her, during life, for her sole and separate use, upon her separate receipt, without the control or interference of any husband:
6. Although the use of the words "free from debts," etc., is perhaps not essential to create a spendthrift trust, their omission, in the case of the daughter, was significant of the testator's intention with respect to her, and the trust for her benefit could not be sustained as a spendthrift trust.

Before STERRETT, GREEN, CLARK, WILLIAMS, McCOLLUM and MITCHELL, JJ.

No. 81 January Term 1890, Sup. Ct.; court below, No. 26 October Term 1879, O. C.

An account, settled by the Girard Life Insurance, Annuity and Trust Company, substituted trustee under the will of Philip Dorney, deceased, for Amanda C. Dorney, now Kuntzleman, exhibiting a balance in the hands of the accountant, having come before the Orphans' Court for audit, the auditing judge, HANNA, P. J., filed an adjudication in part as follows:

The trust arises under the will of Philip Dorney, deceased, dated March 24, 1840, and duly proved September 16, 1840.

Adjudication.

After certain bequests, unnecessary to mention, he gave one equal tenth part of his residuary estate unto George Miller, one of the executors, "in trust, to place and continue the personal estate at interest, on good landed security or interest, or invest the same in some productive public funds, or loans, and to pay the interest and income thereof, and the rents, issues, and profits of the real estate, unto my said daughter Amanda Cornelia Dorney, for her sole and separate use, upon her separate receipt, without the control or interference of any husband she may have or take, for and during all the term of her natural life; and, from immediately after the decease of my said daughter, Amanda, in trust to and for the only proper use, benefit, and behoof of such persons as would be entitled to the same by the laws of the commonwealth of Pennsylvania, if my said daughter had survived her mother, and husband, if any she may have, and died intestate seised and possessed of the said premises, and for such estate and estates as such person or persons would in such case be entitled to by the laws aforesaid."

It appeared that testator's daughter, at the date of the will, was a child five years of age, of course unmarried, and not in contemplation of marriage. She did not marry until June 14, 1855, and her husband died in November, 1864.

From these facts, the conclusion is clear that the trust for the sole and separate use of the daughter could not be upheld: *Wells v. McCall*, 64 Pa. 212. And, as suggested by AGNEW, J., in *Ogden's App.*, 70 Pa. 508, if the active duties had sole reference to this supposed trust, they would necessarily fall with it, and "the object of the testator having failed or ceased, the law will execute the use." But this is not all that is contained in this clause of the will. The trust is not alone for the sole and separate use, but is also expressly to continue during all the term of the natural life of the daughter, with remainder to those who would be entitled to take if she survived her mother and husband, and died intestate, seised and possessed of the said premises. This presents the question, who would take the estate if the daughter died seised thereof and intestate, having survived her mother and husband? If she leaves issue, they will take; and if she leaves no issue, then her surviving brothers and sisters, and the issue of any deceased will be entitled to take.

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The cestui que trust has survived her mother and husband, and is still living. But it cannot be ascertained until her death who will be entitled to the corpus of the trust estate. If the remainder had been to those who would take had she died intestate, then it would be to her heirs generally, and by operation of the Rule in Shelley's Case, she would have taken an estate in fee. Such, however, is not the language in this will, and if either her mother or husband had survived her, they, upon her death, would have taken as her heirs under the intestate law; but as she survived them, a different class of persons will be entitled to the estate at her death. And they will take as purchasers under the will of the donor or testator, not derivatively from the cestui que trust under the intestate law. It would seem, therefore, that the trust should be maintained for their protection. *Both or int. ac 672u p 126*

—The auditing judge accordingly held, citing *Ralston v. Waln*, 44 Pa. 279; *Earp's App.*, 75 Pa. 119; *Dodson v. Ball*, 60 Pa. 492, and *Bacon's App.*, 57 Pa. 509, that the trust must be sustained for the protection and benefit of the remaindermen, and awarded the balance, being the corpus of the estate, to the accountant, as trustee under the will.

Exceptions to this part of the adjudication, after argument, were overruled by the court, *ASHMAN, J.*, filing an opinion in part as follows:

Under the two-fold capacity in which this trust was intended by the testator to operate, it is immaterial that only one of its functions should have come into play. One purpose was to protect the daughter against the control or the debts of her husband; but that was scarcely the paramount intent, because the daughter was neither married nor contemplating marriage when the will was written. The other purpose was to protect her against herself, and to preserve the estate unimpaired for the remaindermen. The trustees were specially directed to invest the personal estate, and they were as fully charged with the control of the real estate, by the direction to pay over the rents and profits. These duties were to continue during the life of the daughter, and that they rendered the trust an active one is shown by the decisions in *Barnett's App.*, 46 Pa. 392, *Bacon's App.*, 57 Pa. 504, *Ashhurst's App.*, 77 Pa. 464.

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In the last two of these cases, the trust was sought to be set aside, because the first takers had become discoverd; but it was held that the trust continued, notwithstanding the discoverdure. In *Lightner's App.*, 11 W. N. 181, the trustee was ordered to make investments, to pay the income to the testator's daughter during life, and to convey the estate at her death to her heirs. The active duties which were involved in the trust compelled the vesting of the legal estate in the trustee, and, the daughter's interest, remaining equitable, was prevented from coalescing with the legal estate in remainder.

Under that authority, this trust could not be held to be executed, even if the gift over had been without qualification to "such persons as would be entitled to the same by the laws of the commonwealth," provided the daughter had died intestate; words which, in *Dodson v. Ball*, 60 Pa. 492, *Yarnall's App.*, 70 Pa. 335, and *Tucker's App.*, 72 Pa. 354, were said to be equivalent to heirs and next of kin. The gift, however, was only to the members of these classes who should remain after the mother and husband of the first taker had been excluded, and the persons so selected would necessarily take as purchasers. The fund is personalty; and in a gift of personal estate, the husband is an "heir" of his wife: *Eby's App.*, 84 Pa. 241. See also *Gibbons v. Fairlamb*, 26 Pa. 217. The exceptions to the ruling of the auditing judge on this point are overruled.

And now, to wit, October 5, 1889, this cause having come on to be heard, and having been argued by counsel, it is ordered, adjudged, and decreed that the balance of principal in the hands of the accountant is \$12,282.67, which consists of \$11,911.06 in securities, as stated in the account, and \$371.61 in cash, and that the said balance is hereby awarded to the accountant as trustee under the will of the testator.

—Thereupon Amanda C. Kuntzleman, the cestui que trust, took this appeal, specifying that the court erred:

1. In holding that the trust in question was an active trust.
2. In holding that the parties, to take in remainder, take as purchasers.
3. In not awarding the corpus of the trust estate to Amanda C. Kuntzleman.
4. In awarding the corpus of the trust estate to the trustee.

Arguments.

Mr. R. H. Neilson (with him *Mr. W. D. Neilson*), for the appellant:

1. The only question raised by this appeal is whether the trust created by the will of Philip Dorney is an executed trust. The separate use trust for the appellant failed: *Wells v. McCall*, 64 Pa. 208; and, as the persons who will take in remainder are precisely the right heirs of the life-tenant, her husband and mother being dead, she claims the operation of the Rule in *Shelley's Case*. It would serve no good purpose to review the many cases upon the subject of active and passive trusts, decided since the announcement of the present policy of the law of Pennsylvania in *Barnett's App.*, 46 Pa. 392. As to a spendthrift trust, there is nothing in this will upon which such a trust can be based: *Ashhurst's App.*, 77 Pa. 464. Nor is there difficulty, in the light of the authorities, in solving the question whether this trust can be sustained as a trust to preserve the remainders. Assuming the life estate to be an equitable one, does the Rule in *Shelley's Case* apply?

2. In the gift of a remainder to "such persons as would be entitled under the intestate law," these words are equivalent to the word heirs: *Dodson v. Ball*, 60 Pa. 492; *Williams's App.*, 83 Pa. 377; *Norris v. Rawle*, 16 W. N. 240. The exclusion of the life-tenant's husband from those entitled to take in remainder, did not narrow the line of descent, nor prevent the operation of the Rule in *Shelley's Case*: *Yarnall's App.*, 70 Pa. 501; *Tucker's App.*, 75 Pa. 354. *Ralston v. Waln*, 44 Pa. 279, relied on by the appellee, turns on the use of the words next of kin, or else it is at variance with *Yarnall's Appeal*. Besides, the decision was rested on *Anderson v. Dawson*, 15 Ves. 532, wherein Sir WILLIAM GRANT, in his opinion, says that a limitation to next of kin is a limitation to heirs of a particular class. Words of distributive modification have always prevented the application of the Rule in *Shelley's Case* in England: *Greenwald v. Rothwell*, 5 M. & G. 628; which is not the rule here: *Physick's App.*, 50 Pa. 128. And see as to *Anderson v. Dawson*, the opinion of Mr. Justice AGNEW, in *Dodson v. Ball*, 60 Pa. 492.

3. The words creating the remainder in this will differ from those considered in *Yarnall's Appeal*, only in that the mother of the cestui que trust, as well as her husband, is excluded.

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This can make no difference in the result now, as the mother is dead. Perhaps the trust should have been sustained during her lifetime, so as to prevent any share of the funds from going to her in case of the life-tenant's death, but any such purpose has now ceased. Notwithstanding the imposition of active duties upon the trustee, the courts will not sustain a trust when its object has failed: *Megargee v. Naglee*, 64 Pa. 216; *Williams's App.*, 83 Pa. 377; *Rea v. Trust Co.*, 16 W. N. 48; *Ogden's App.*, 70 Pa. 501. The duties of the trustee, under this will, are far less active and discretionary than in *Megargee v. Naglee*, *supra*; *Williams's App.*, *supra*; and *Tucker's App.*, 75 Pa. 354; yet in all those cases the trusts were held to be executed. The life-estate is therefore legal, and there is nothing to prevent its coalescing with the remainder and no conceivable reason for a different decision in this case from that in *Williams's Appeal*, where the will was almost identical with this one. It is the duty of the court to enforce the Rule in *Shelley's Case*: *Bassett v. Hawk*, 118 Pa. 94. Between descent and purchase, the law favors descent: 2 Bl. Com., 200; *Waln's App.*, 4 Pa. 502; *Carroll v. Burns*, 108 Pa. 386. *Watson's App.*, 125 Pa. 340, and *Fowler's App.*, 125 Pa. 388, are in harmony with our position.

Mr. George Tucker Bispham, for the appellee:

The trust created by this will may be sustained upon two grounds:

1. The trust is active during the continuance of the life-estate, and therefore that estate is an equitable one, incapable of coalescing with the legal estate in remainder. The will, upon its face, *prima facie* imports an active trust, involving the performance of active duties by the trustee, apart from the circumstance that the limitation is for the sole and separate use of the testator's daughter: *Barnett's App.*, 46 Pa. 392; *Bacon's App.*, 57 Pa. 504. *Ogden's App.*, 70 Pa. 501, cited by the appellant, does lay down the rule that incidental active duties will not necessarily keep a trust alive, if its main purpose falls. But this case is distinguished from *Ogden's Appeal* by two circumstances: (a) The express direction to invest and to perform active duties in the selection of securities for investment, in which respect the case resembles *Lightner's App.*, 11 W. N.

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181; and (b) the fact that the limitation to the first taker is expressly for life only: see opinion of Mr. Justice AGNEW in Ogden's Appeal.

2. The limitation over does not bring the gift within the Rule in Shelley's Case, even if the particular estate be considered a legal estate. The limitation is not to executors and administrators, which, so far as personalty is concerned, is the equivalent of the word heirs, in connection with realty: *Anderson v. Dawson*, 15 Ves. 537; *Ralston v. Waln*, 44 Pa. 279; nor is it even to those who would take under the intestate laws. It is to some of these only. Plainly, therefore, the rule of succession is changed. It is no answer to say that the husband and mother, who are excluded, are now dead. Suppose Mrs. Kuntzleman marries again. Whether any future husband would be entitled to take would depend upon whether the provisions of the will are carried out. But to look at the condition of things now, is to take too narrow a view. The death of the husband and mother in Mrs. Kuntzleman's lifetime is a mere accident which cannot alter the interpretation to be given to the will. Whether the limitation over is to take effect by way of purchase or not, is to be determined by the words used in the will and the circumstances as they existed at the death of the testator. This is the answer to *Yarnall's App.*, 70 Pa. 335, in which there was no exclusion of the mother. That exclusion renders *Williams's App.*, 83 Pa. 377, inapplicable also.

OPINION, MR. JUSTICE CLARK:

The will of the testator, Philip Dorney, was probated on the 16th of September, 1840; at that time his daughter, Amanda Cornelia, the appellant, was a child five years of age, of course unmarried and not contemplating marriage. She was first married to Craig, June 14, 1855; her husband died in November, 1864. She was afterwards married to Kuntzleman, and survived her second husband also.

The testator's will contained a clause as follows:

"And the remaining one full equal and undivided tenth part thereof unto the said George Miller, his heirs, executors, administrators, and assigns, in trust, nevertheless to place and continue the personal estate at interest on good landed security

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or interest, or invest the same in some productive public funds, or loans, and to pay the interest and income thereof, and the rents, issues, and profits of the real estate, unto my said daughter, Amanda Cornelia Dorney, for her sole and separate use, upon her separate receipt, without the control or interference of any husband she may have or take, for and during all the term of her natural life; and, from immediately after the decease of my said daughter, Amanda Cornelia Dorney, then, in trust, to and for the only proper use, benefit, and behoof of such person, or persons, as would be entitled to the same by the laws of the commonwealth of Pennsylvania, if my said daughter had survived her mother, and husband, if any she may have, and died intestate, seised and possessed of the said premises, and for such estate and estates, as such person or persons would, in such case, be entitled by the laws aforesaid."

The appellant's contention is, that the whole purpose of the trust, created by this clause of the will, was a trust for coverture, or for the separate use of the testator's daughter, which fell for lack of a marriage, or a contemplated marriage, to support it; that as her mother and her husband are both dead, the parties to take, at the daughter's death, are her right heirs, and that by the Rule in Shelley's Case she has an absolute estate in the fund for distribution. The appellees, on the other hand, contend, first, that the trust is active during the continuance of the life-estate of Mrs. Kuntzleman; that her estate therefore is an equitable estate, whilst the estate to the heirs in remainder is legal, and that for that reason the former cannot coalesce with the latter; and, second, that, even if the particular estate be held to be a legal estate, the estate in remainder is limited in language which does not bring the gift within the rule.

It is conceded on all hands, that for the reasons already stated the trust cannot be sustained as a separate use, or as a trust for coverture, and the authorities are full and plain upon this point: *Wells v. McCall*, 64 Pa. 208; *Ogden's App.*, 70 Pa. 501. Nor, apart from the purpose of the testator with respect to the remainder, can we discover any other object to be attained by the trust, than a separate use for his daughter. In the case of each of his sons, the income was to be "free from their debts," etc.; and, although the use of these words, per-

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haps, was not essential to create a spendthrift trust, their omission in the clause quoted is significant in the ascertainment of his purpose with respect to his daughter. There is nothing in this will to indicate the testator's intention to create a spendthrift trust; on the contrary, it is plain that his purpose was to create a trust for coverture.

Where an active trust is created to give effect to a well defined, lawful purpose of a testator, in relation to his family, the trust will be sustained, whether the cestui que trust be sui juris or not. This was established in *Barnett's App.*, 46 Pa. 392, overruling, in terms, *Kuhn v. Newman*, 26 Pa. 227, where a different doctrine had been declared, and the ruling in *Barnett's Appeal* has since been steadily maintained: See *Earp's App.*, 75 Pa. 119, and cases there cited. In these cases, however, the bequests and devises of income were to children for life, irrespective of coverture, and a clear purpose appeared to protect the corpus of the estate for the ultimate devisees.

But the cases cited, and many more in the same line and to the same effect, are clearly distinguishable from those in which the purpose of the testator is to create a trust for coverture. A trust for coverture is one of the well-settled instances, in the doctrine of special trusts, where the trust falls if there is no marriage, in fact or in contemplation, to support it, or where upon the husband's death coverture ceases. And it is immaterial that the trust imposes active duties upon the trustee. These duties are only subsidiary to the main purpose: they are mere incidents or adjuncts to the trust; and, if the trust itself falls, these active duties are dispensed with; they will not uphold the trust, they fall with it: *Megargee v. Naglee*, 64 Pa. 216; *Yarnall's App.*, 70 Pa. 336; *Ogden's App.*, 70 Pa. 501; *Ashhurst's App.*, 77 Pa. 464; *Williams's App.*, 83 Pa. 377.

But we think the testator's purpose, in part, was by means of this trust to protect the corpus of the estate for the parties entitled in remainder, and we are of opinion that the trust should be upheld in support of the remainder. The bequest of the interest and income is expressly for life and not during coverture, and is of the income only, not of the corpus of the estate. Those entitled in remainder are "such person or persons as would be entitled to the same by the laws of the com-

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monwealth of Pennsylvania," if the daughter "had survived her mother and husband," and died intestate. The expression "such person or persons as would be entitled to the same by the laws of the commonwealth of Pennsylvania," may perhaps be taken to signify "heirs": *Dodson v. Ball*, 60 Pa. 492; *Williams's App.*, 83 Pa. 377; and it may be assumed that the persons entitled under the words of the entire clause are such persons as, at the daughter's death, are her heirs-at-law, exclusive of her mother and her husband.

But, to bring the devise within the Rule in *Shelley's Case*, the limitation in remainder must be to the heirs in fee, or in tail, as a nomen collectivum for the whole line of inheritable blood. When the testator annexes words of explanation to heirs, or heirs of the body, as to heirs now living, etc., using the terms as mere *descriptio personarum*, or for the specific designation of individuals, a new inheritance is thereby grafted upon the heirs to whom the estate is given: 4 Kent Com., 221; and they will be assumed to take as purchasers. The Rule in *Shelley's Case*, when applied to real property, enlarges the life-estate into an inheritance. The heirs, in such case, therefore, take *qua* heirs, and it is not in the power of the testator to prescribe a different qualification to heirs, from what the law prescribes when they take in the character of heirs.

For these reasons, we are of opinion that the limitation over, in this case, does not bring the gift within the rule, even if the particular estate should be considered legal. The limitation is to some only of those who would take under the intestate law. The husband and the mother are expressly excluded. It is true they are both now deceased, but that circumstance can have no effect: the testator's intent must be ascertained from and his will construed according to the words of the will; and these are to be read in the light of the circumstances under which the will was written. The merely accidental fact that the husband and mother are both now dead, does not bear upon the testator's intent at the execution of the will, or determine its meaning when it took effect.

Yarnall's Appeal, *supra*, may perhaps be regarded as authority for the proposition that the exclusion of the husband does not narrow the line of descent, when the donor's intention was to create a trust for the separate use of the wife. Mr. Justice

Syllabus.

AGNEW, delivering the opinion of the court in that case, said :
 " It is argued that the exclusion of the husbands of the daughters in the remainder clause narrows the line of descent. But, clearly, this does not change the intent of the testatrix in this will, for it must be remembered that there were no husbands in existence, and that this so-called exclusion is an expression corresponding with the intent of the testatrix, which was to give the daughters separate estates, the effect of which would be to exclude the husbands." Whilst this reasoning is not entirely clear, it is plain that it does not extend to the exclusion of the mother.

We are of opinion that the Rule in Shelley's Case has no application ; that the parties entitled at the death of the testator's daughter take by purchase, and the trust should be upheld to protect their rights.

The decree of the Orphans' Court is affirmed,
 and the appeal dismissed at the cost of the appellant.

 ESTATE OF F. A. COMLY, DECEASED.

APPEAL BY C. A. COMLY ET AL. FROM THE ORPHANS' COURT
 OF MONTGOMERY COUNTY.

Argued February 5, 1890—Decided October 6, 1890.

- (a) A testator bequeathed personalty, in trust, to pay the income thereof in equal shares to four persons, " so long as any of said legatees may live, it being my wish and direction that the trust estate shall be kept together as a whole until the death of all the said legatees." Upon the death of any one of them, it was provided :
- (b) " Then the part payable to such deceased legatee shall be payable to their heirs, assigns, or legal representatives, as the case may be ; " and upon the death of all four, the principal to be divided into four equal parts, " and one fourth to be paid over to the heirs, assigns, or legal representatives, of each of the four legatees : "
1. The word " heirs," when used in a limitation of personal property to the heirs of the first taker, either substitutionally or by way of succession, is generally understood to mean those entitled under the statutes

136	153
180	82
136	153
211	208

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of distribution in case of intestacy, and in this instance, indicated the legatee's next of kin under the intestate laws.*

2. The words "assigns or legal representatives," following the word "heirs," were referable to the latter word "heirs," in the will, so that the income payable to the deceased legatee for and during his life only, should from and after his decease be paid to his heirs and *their* assigns or legal representatives.
3. By said will, an active, valid and continuing trust was created for the management of the fund bequeathed, the payment of the income thereof to the four primary beneficiaries during their respective lives, and the preservation of the corpus for distribution on the death of the last survivor.
4. Wherefore, a creditor, attaching the interest of one of the primary beneficiaries, by writ served upon the trustee after the death of the debtor, must be confined to the share of the income accruing to the primary beneficiary before the latter's death.

Before STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 62 July Term 1889, Sup. Ct.; court below, number and term not given.

On May 5, 1888, Peter C. Hollis and John S. Wise, executors of the will of Franklin A. Comly, deceased, filed their account showing a balance due the estate, of income \$6,334.13, and of principal, consisting of securities and cash, \$149,056.51. Thereupon, no exceptions having been filed, *Mr. Montgomery Evans* was appointed auditor to report a distribution.

The auditor subsequently filed a report finding that the testator died on April 23, 1887, testate, leaving to survive him neither widow nor children, but next of kin as stated in the opinion of the Supreme Court. By his will, wholly written by himself, dated June 27, 1885, and duly admitted to probate on April 28, 1887, after making certain specific bequests, he provided as follows:

"I do hereby give to Peter C. Hollis and John S. Wise all my property and estate of whatsoever kind in trust (i. e. not otherwise hereinbefore or hereinafter disposed of) to be held by them for the use and purpose herein named, to wit: The yearly income from said estate to be divided into four equal parts, one fourth part to be paid to my sister Sarah W. Pax-

* Cf. McKee's App., 104 Pa. 571; Ashton's Est., 134 Pa. 390.

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son, one fourth part to be paid to my brother Joshua Comly, one fourth part to be paid to my niece Emma P. Trexler, and one fourth part to be paid to my nephew Franklin A. Comly, Jr.; said yearly income to be paid to them quarterly or half yearly, as may be most convenient, so long as any of the said legatees may live, it being my wish and direction that the trust estate shall be kept together as a whole until the death of all the said legatees; and upon the death of any one of them, then the part payable to such deceased legatee shall be paid to their heirs, assigns, or legal representatives, as the case may be, and upon the death of all four of the legatees, then the principal of the trust estate to be divided into four equal parts, and one fourth part paid over to the heirs, assigns or legal representatives of each of the four legatees."

Letters testamentary were issued to Peter C. Hollis, and John S. Wise, the executors named in said will.

The auditor found also that Joshua Comly, named in the foregoing provision, was indebted to the testator in the sum of \$90, borrowed money, evidenced by a note dated December 22, 1886, and payable on demand; and that on June 10, 1887, said Joshua Comly executed a note under seal to Lucressa R. Righter, with warrant of attorney to confess judgment for \$4,848.46, and on the same day judgment was entered thereon and an attachment-execution immediately issued and served upon the accountants as garnishees. Said Joshua Comly died insolvent on November 20, 1887, leaving a widow, Catharine Comly, and a daughter, Mrs. Lizzie Purviance.

The contention before the auditor was, who was entitled to the one fourth part of the income, accrued and accruing, and by the will made payable to Joshua Comly,—the attaching creditor, or the widow and daughter of said Joshua Comly?

The auditor, in an elaborate report, citing *Bentley v. Kauffman*, 86 Pa. 99; *Muhlenberg's App.*, 103 Pa. 587; 2 *Williams on Exrs.*, 1129, 1131; *Roper on Legacies*, 124; *Cox v. Curwen*, 118 *Mass.* 198; 1 *Redf. on Wills*, 406; 2 *Jarman on Wills*, 94, 654; *Ralston v. Waln*, 44 Pa. 279; *Fleck's Est.*, 1 *Pars.* 126; *Mark v. Hunsicker*, 1 *Pears.* 513; *Griffith v. Woodward*, 1 *Y.* 316; *Oswald v. Kopp*, 26 Pa. 516, concluded:

"The auditor finds as a conclusion of law that Joshua Comly was entitled to receive the one fourth part of the income, dur-

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ing his life, and a further right to dispose of that income by will, assignment or otherwise, during the life of the survivor of the legatees named with him, and of the fourth part of the principal which will become payable at such survivor's death; and if he make no such disposition, then his interest will go to his legal representatives. If the auditor be correct in his view, then it follows that Joshua Comly's share of income and principal, being vested in him, is subject to the attachment-execution; and, after that shall have been satisfied, his further interest will be payable to an administrator of his estate."

The auditor, therefore, reported a distribution awarding to Lucretia R. Righter, the attaching creditor, the sum of \$1,560.23, being the one fourth of the income accounted for, increased by a small surcharge, less \$90 payable upon the note to the testator.

To this report, Mrs. Catharine Comly and Mrs. Lizzie Purviance filed exceptions. Said exceptions having been argued, the court, WEAND, J., on April 15, 1889, entered a decree, without opinion filed, dismissing the exceptions and confirming the distribution reported by the auditor. Thereupon, the exceptants took this appeal, specifying the dismissal of their exceptions and the confirmation of the auditor's report for error.

Mr. N. H. Larzelere (with him *Mr. M. M. Gibson* and *Mr. Samuel Dickson*) for the appellants.

That the trust was an active one, counsel cited: *Rife v. Geyer*, 59 Pa. 398; *Hutchison's App.*, 82 Pa. 509; *Earp's App.*, 75 Pa. 119; *Ashhurst's App.*, 77 Pa. 464. That the gift of the income for life is distinguishable from the gift of a life-estate, and is not an estate for life, or the equivalent of a life-estate: *Kline's App.*, 117 Pa. 139; *Joyce's Est.*, 21 W. N. 510; *Earp's App.*, supra; *McDevitt's App.*, 113 Pa. 103; *Fowler's App.*, 125 Pa. 388. That the words "heirs or legal representatives" meant the next of kin and distributees: *Potter's Est.*, 13 Phila. 318; *Eby's App.*, 84 Pa. 241; *Stook's App.*, 20 Pa. 349; *Shuman v. Walker*, 1 Chest. Co. R. 170; *Ralston v. Waln*, 44 Pa. 283; *Gibbons v. Fairlamb*, 26 Pa. 217.

Mr. John G. Johnson (with him *Mr. Bernard Gilpin*), for the appellees.

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Counsel cited : Theobald on Wills, 835, 870 ; Reed's App., 118 Pa. 221 ; 1 Roper on Leg., 124, 134.

OPINION, MR. JUSTICE STERRETT :

This contention hinges on the construction of a clause in the olographic will of Franklin A. Comly, a successful and intelligent business man, who died April 28, 1887, at the age of 73 years, unmarried and without issue.

It appears from the learned auditor's report that testator's property was all personal, consisting mainly of stocks and securities of railroad, iron manufacturing and other companies, with which he had been actively identified, amounting to about \$150,000. At the time of his decease, and for many years prior thereto, he was president of the North Pennsylvania Railroad Company, and owned stock thereof to the value of \$65,000. His next of kin, according to our statute of distributions, were :

1. The issue of a sister, Sarah W. Paxson, who died about two weeks before testator, but more than a year after he made his will, leaving to survive her one son and two widowed daughters.

2. The issue of a brother, Samuel W. Comly, who pre-deceased the testator about three years leaving issue a son, Franklin A. Comly, Jr., who is unmarried and about thirty-two years of age, and a daughter, Emma P., wife of William F. Trexler, aged about thirty-five years and having three children whose ages are fifteen, thirteen, and eleven years, respectively.

3. A brother, Joshua Comly, who at the time of testator's death was suffering from a disease known to both of them to be incurable, and of which he died about six months thereafter, insolvent, leaving to survive him a widow, Catharine Comly, and one daughter, Mrs. Purviance, the appellants in this case.

After making several specific bequests, the testator in his last will and testament, dated June 27, 1885, gave the residue of his estate "to Peter Hollis and John S. Wise," in trust as follows :

"To be held by them for the use and purpose herein named, to wit, the yearly income from said estate to be divided into four equal parts, one fourth part to be paid to my sister, Sarah W. Paxson, one fourth part to be paid to my brother Joshua

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Comly, one fourth part to be paid to my niece Emma P. Trexler, and one fourth part to be paid to my nephew Franklin A. Comly, Jr.; said yearly income to be paid to them quarterly or half yearly, as may be most convenient, so long as any of the said legatees may live, it being my wish and direction that the trust estate shall be kept together as a whole until the death of all, the said legatees; and upon the death of any one of them, then the part payable to such deceased legatee shall be paid to their heirs, assigns, or legal representatives, as the case may be, and upon the death of all four of the legatees, then the principal of the trust estate to be divided into four equal parts, and one fourth part paid over to the heirs, assigns, or legal representatives of each of the four legatees."

The corpus of the trust-estate, less expenses of administration, etc., to wit, \$148,437.50, was properly awarded to the trustees, to be held in trust according to the provisions of the will. The net amount of income accrued and unpaid, as found by the auditor, was \$6,600.93, one fourth of which, \$1,650.23, was awarded to the three children of Mrs. Paxson, and the same sum each to Mrs. Trexler and Franklin A. Comly, Jr. No question is raised as to the disposition thus made of the corpus of the trust, or either of the three shares of accrued income. The remaining one fourth of the income, viz., \$1,650.23, was awarded to Mrs. Lucressa R. Righter, on account of debt and costs of attachment-execution, 543 June Term 1887, Common Pleas of Philadelphia, against Joshua Comly. It is conceded by appellant that the attaching creditor is entitled to one fourth of the income which accrued prior to the death of Joshua Comly, less the amount of the note, viz., \$606.58, but they deny that she is entitled to any part of the income which accrued after his decease. As to that, their contention is that it belongs to them as beneficiaries of the trust, according to its terms. In other words, they claim that, upon the death of Joshua Comly, the trust as to him ceased, and thereupon they became the designated beneficiaries thereof.

The correctness of that position depends on the intention of the testator as gathered, not from a single clause, but from the four corners of his will. It cannot be doubted that he created an active and valid continuing trust for the management of his residuary estate, the payment of the income thereof to the

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four primary objects of his bounty during the terms of their respective lives, and the preservation of the corpus for distribution upon the death of the last survivor of them. It does not appear to have been his intention to give either of the four beneficiaries for life any interest in, or control over, either the corpus of the trust, or the income arising therefrom, except so much of the latter as accrues during his or her lifetime. The income is expressly limited to each of them, respectively, for life, and was doubtless intended as a purely personal benefit, terminating at his or her decease. Hence it was necessary to designate the person or persons to whom the trustees should pay the income accruing after the death of each of said beneficiaries, except the last survivor, and the testator undertook to do so by directing that it should be paid to the deceased beneficiary's "heirs, assigns, or legal representatives, as the case may be." The phrase thus employed is evidently intended to designate, not by name, but by description, the person or persons to whom, in each contingency, the one fourth of the income should be thereafter paid, thus making a quasi substitutionary gift of the income to them. The leading word, expressive of the testator's thought, is "heirs;" a technical word, not applicable to a gift of personalty, but popularly understood, when so applied, in the sense of the next of kin according to our statute of distributions; and that is the sense in which the phrase would be generally understood by laymen. While there is some room for difference of opinion on the subject, the weight of authority is that the word "heirs," when used in a limitation of personal property to the heirs of the first taker, either substitutionally or by way of succession, is understood as meaning those entitled under the statutes of distribution in case of intestacy: *Eby's App.*, 84 Pa. 241; *Morton v. Barrett*, 22 Me. 264; *Mace v. Cushman*, 45 Me. 250, 261; *Houghton v. Kendall*, 7 Allen 72, 77; *Sweet v. Dutton*, 109 Mass. 589; *Finlason v. Tatlock*, L. R. 9 Eq. 258.

The words "assigns or legal representatives," following the word "heirs," in the will before us, are referable, we think, to the latter word, "heirs," as though the testator had directed that the income payable to the deceased beneficiary for and during his life only, should from and after his decease be paid to his heirs and their assigns or legal representatives. In con-

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struing the will before us, the fact that the testator was not a lawyer must not be overlooked. It may be fairly assumed that in writing the will he employed popular, rather than technical language. Doubtless, the first reading of the will would convey to nearly every layman the impression that the testator not only intended his brother's interest should terminate with his life, but also that, upon his death, his share of the income, and ultimately the corpus from which it accrued, should pass, immediately and by virtue of the will, to those whom the intestate law would designate as his brother's distributees. Such an idea as the continuance of his brother's interest, after death, until the termination of the trust, would never occur to his mind, because it is essentially technical. The death of his brother and the use of the word "heirs" simply marked the time of change in the beneficial ownership. The testator's intention, we think, was to give his brother a purely personal benefit. The gift is expressly for his life, and the language following imports an absolute gift to his "heirs," as such. There is nothing on the face of the will to indicate any intended benefit to his creditors. On the contrary, the fact of the creation of the trust, and the use of the word "heirs," in the sense in which it must have been employed, show rather an exclusion of them. After his brother's death, his "heirs," used in the sense of next of kin under the intestate law, and not his brother's "assigns or legal representatives," appear to have been testator's first thought. The transmission of beneficial ownership, upon his brother's death, was immediate and direct to the "heirs" or next of kin of the latter, their "assigns or legal representatives, as the case may be."

We are therefore of opinion that the court erred in awarding one fourth of the income (less \$90 to the executors in payment of the note of Joshua Comly, deceased), to the attaching creditor; that she is entitled only to one fourth of the income which had accrued prior to the decease of said Joshua Comly, less said sum of \$90, to wit, \$606.58, and the said appellants are entitled to the residue of the income for distribution.

It is therefore ordered and decreed that so much of the decree as awards \$1,560.23 to Bernard Gilpin, attorney for Lucressa R. Righter, on her attachment-execution, etc., be reversed, and

Syllabus.

set aside, at the costs of appellee ; and the said sum of \$1,560.23 is now distributed as follows, to wit:

To Bernard Gilpin, atty., etc., ...	\$ 606 58
“ Catharine A. Comly, widow., ...	317 88
“ Lizzie C. Purviance., ...	635 77
Total sum., ...	\$1,560 23

J. W. SHAAK, ADMR., v. C. H. MEILY.

APPEAL BY PLAINTIFF FROM THE COURT OF COMMON PLEAS
OF LEBANON COUNTY.

Argued February 18, 1890—Decided October 6, 1890.

[To be reported.]

(a) In a suit by the administrator of the insured to recover from an assignee of a life insurance policy the money collected thereon by the defendant from the insurance company, the defendant alleged that he received the assignment in consideration, in part, of a debt due to a firm of which he was a member :

1. It being shown that, at the time of receiving the assignment, the debt due to the firm was charged upon the firm books against the defendant and assumed by him, and that his partner would be under no liability to him should a recovery be had in this suit, the partner was a competent witness for the defendant.
2. When a life policy is issued to a creditor who holds it as security for his debt, the insured having a resulting equitable interest therein, a parol equitable assignment of such interest by the insured to another creditor, perfected by a transfer of the legal title from the beneficiary, may be valid as against the administrator of the insured.
3. In an action by the administrator of the insured against such assignee, for the proceeds of the policy collected by him, proof of the fact that, before the assignment of it to the defendant, the beneficiary named in the policy had made a general assignment for the benefit of creditors, will not in any way aid a recovery by the plaintiff.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, McCOLLUM and MITCHELL, JJ.

No. 283 January Term 1889, Sup. Ct. ; court below, number and term not shown.

Statement of Facts.

On August 10, 1887, John W. Shaak administrator of the estate of George Fisher, deceased, brought assumpsit against Charles H. Meily for money had and received. Issue.

At the trial on March 7, 1888, it was shown upon the part of the plaintiff that in March, 1873, George Fisher, the plaintiff's decedent, made application to the United Brethren Mutual Aid Society of Pennsylvania, for an insurance upon his life in the sum of \$3,000, in favor of E. Z. Kehler, who was not related to Fisher but was his creditor for an amount under \$100, and on March 12, 1873, in pursuance of that application, the society issued a policy or certificate of insurance to Kehler; that Kehler paid the original premium upon the policy, and also all the annual and assessment dues thereon until June 6, 1874, when he assigned the policy to the defendant, who paid all the assessments which became due upon it thereafter; that Fisher died sometime in 1876, and on March 4, 1876, after his death, the society paid to the defendant Meily, upon the policy, the sum of \$2,763.52. A. S. Light, being called by the plaintiff, testified that on June 4, 1873, the witness was appointed assignee for the benefit of creditors of E. Z. Kehler. The plaintiff then rested.

The defendant called Joseph R. Euston, who testified, under objection, that the witness was an agent of the United Brethren Mutual Aid Society; that both before and after the policy in Kehler's favor was taken out, Fisher told the witness that he was indebted to Kehler and the policy was for the payment of his debt to Kehler; that a short time before the date of the assignment of that policy from Kehler to Meily, Fisher spoke to the witness about making an application for another policy, to be made in favor of Meily and Adolphus Reinoehl; but such an application was never made, the witness being subsequently informed, either by Fisher or by some one else, that other arrangements had been made.

A. Stanley Ulrich testified for the defendant, under objection, that Fisher told the witness that he, Fisher, had got Kehler to assign the policy to Meily for the latter's security, but did not say on what account the assignment was made; that the witness knew that Meily was bail on two notes given to a building association, of which the witness was secretary, as security for loans made to Fisher. The witness produced

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the notes referred to, both of which were dated in 1868, one being for \$477, signed by George Fisher, Adolphus Reinoehl and Chas. H. Meily; the other being for \$292, signed by George Fisher and Adolphus Reinoehl. The witness testified that Meily was treated as being bail on the second note; that the notes were held until 1877, the final payment upon them being made March 7, 1877; that some of the monthly payments on the loans were made by Reinoehl & Meily, but that in 1872, George Fisher made an arrangement with Philip Fisher, under which George conveyed his house to Philip who made all the payments after that; that if the loans had been paid up at the date of that arrangement, the amount required for that purpose would have been \$590. The witness also produced certain books of the building association, exhibiting the transactions connected with the loans to Fisher, which were offered and admitted in evidence for the defendant against the objection of the plaintiff.

The defendant then called Adolphus Reinoehl, and offered to prove by him conversations had with Fisher and Kehler before, at the time of, and immediately after the assignment of the policy by Kehler to Meily, to show that the assignment was for the purpose of securing indebtedness from Fisher to Meily, and indebtedness of Fisher to Reinoehl & Meily, at that time assumed by Meily. The plaintiff objected to the witness as incompetent, upon the ground that, as a partner of the defendant in the firm of Reinoehl & Meily, he was interested in the result of the suit, and to the proposed testimony as incompetent and inadmissible for the purpose stated. In connection with the objection to the competency of the witness, the plaintiff offered to ask Kehler whether, at the time he assigned the policy to Meily, there was any arrangement between Meily and himself with regard to what should be done with it. Being asked the purpose of the proposed question to Kehler, the plaintiff's counsel stated it as follows:

"The purpose is to show that at the time when this arrangement was made, and this transfer was effected by Mr. Kehler to Mr. Meily, the understanding between them was that a debt which was due from Kehler to Meily, and a debt which was due from Kehler to Reinoehl & Meily, were to be paid out of this money, after it had been received from the aid society on

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this policy ; and I think I can show by him, furthermore, that the balance of the money was to be paid back to him after deducting the amount of premiums, and the amount of interest of the claims of Meily, and Reinoehl & Meily, against Kehler ; this for the purpose of showing that, by this arrangement as to the payment of the claim of Reinoehl & Meily against Kehler, and its payment out of this money after it was received of the aid society, he was interested through the receipt of this money by the firm of Reinoehl & Meily ; that his firm would be liable to Meily, if a verdict were against Meily here ; that a verdict in this proceeding could be used against Meily in order to recover against the firm of Reinoehl & Meily, and for that reason he would be incompetent as a witness."

By the court: The only question is whether Reinoehl would be affected by this verdict in case it should go against Meily.

The court then called Reinoehl, had him sworn, and examined him upon his voir dire as follows :

" Q. Have you an interest in the result of this suit? A. No, sir. Q. If there is a recovery against Mr. Meily, are you liable to him for any part of it? A. No, sir, I am not liable to pay anything back, if I am not disposed to do so ; for he assumed the arrangement at the time he agreed to assume the debt to Reinoehl & Meily, and that satisfied me, and there was no debt further. Fisher had offered me a policy prior to this to cover this. Q. I want to know whether you are in any way liable? A. I told Meily, whether he would include the Fisher claim that we had against him, as Reinoehl & Meily, and he said he would. Q. Have you received any of the money that was received on this policy? A. No, sir, not a cent. Q. Has it gone into the firm? A. No, sir. Q. The money that was received on this policy, has that gone into the firm? A. The money received for Reinoehl & Meily has, but nothing else. We were afraid we would not get that money, but we got the benefit of it. He keeps the cash book, and Meily charged himself with that claim. Q. By the payment of this money, those debts were paid, and to that amount those debts went into the partnership. Is that not correct? A. The partnership matter was all between Meily and Kehler, and that paid to Meily, he said he would assume that debt, and that satisfied me. Now it is optional with me whether to assume that debt or not."

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By the court: Although the witness has an interest in a part of the proceeds that are now claimed, nevertheless the objection is overruled. We think the interest does not disqualify, and the witness is decided to be competent; exception.⁵

Reinoehl was then examined as a witness and testified to a conversation with George Fisher, in which Fisher told the witness that the assignment of the policy made by Kehler, was to secure a debt Fisher owed to the firm of Reinoehl & Meily; that this debt was about \$120; that at the same time Fisher was indebted to Meily for money borrowed, to a considerable amount, but how much, the witness did not know.

Other testimony for the defendant tended to show that Fisher frequently borrowed money from Meily. Thomas G. Spangler testified for the defendant that, at the date of the policy, Fisher's expectation of life was 20.20 years; that if Fisher had lived out that period, the assessments and dues upon the policy would have amounted to \$2,206.80, and, allowing interest upon the payments, the total amount invested in the policy, at the end of the expectancy of life, would have been \$3,530.88.

The defendant having rested, the plaintiff's counsel made this motion:

Plaintiff's counsel move to strike out the testimony of Joseph R. Euston, A. Stanley Ulrich, and Adolphus Reinoehl, and the books which have been offered in evidence here in connection with the alleged declarations and suggestions of George Fisher as to the disposition of this policy, and his interest in it; for the reason that Fisher's interest in the policy and in the insurance could not be passed to Meily for the purposes claimed, nor for Meily's use, in any respect, by a mere verbal agreement, suggestion or declaration, such as have been testified to, and without notice thereof to the aid society, or having been brought home to Kehler. Only by some memorandum or instrument showing a transfer or delivery of his interest in the policy; something to substitute Meily in place of Fisher as the owner, with full power to exercise every species of dominion over Fisher's interest therein and right thereto, and a renunciation of Fisher's power over it, could the right of Fisher and of his administrator to the insurance be divested.

By the court: We think this motion will have to be re-

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fused. The apparent legal title to the policy was in Kehler, and had passed apparently by the assignment made by him to Meily. The only title that Fisher had in the policy was an equitable title, which could be assigned by parol; and we think, therefore, it will be a question for the jury to determine whether he did pass the title or not, or whether there was a consideration to support the passing of this title, if he did attempt to do so. Therefore, the motion is overruled, and we refuse to strike out the testimony; exception.¹¹

Kehler then testified in rebuttal, for the plaintiff, that he made the assignment of the policy to Meily to secure debts which the witness owed to Reinoehl & Meily, and to Meily individually, and that after the payment of these debts, the witness was to have the balance of the proceeds of the policy; that after Meily had collected the policy, Reinoehl & Meily took out of it the debts due them from Fisher, saying that "he was indebted, and it was not more than right if that was paid;" that the witness had no knowledge before that, so far as he could remember, of Fisher's indebtedness to Meily and to Reinoehl & Meily, and he remembered nothing of Fisher's having anything to do with the arrangements respecting the making of the assignment to Meily. The plaintiff then put in evidence the record of the deed of assignment for the benefit of creditors, from Kehler to A. S. Light, dated June 4, 1873, and other records showing that Light entered upon the performance of his duties as assignee.

The testimony being closed, the court, SIMONTON, P. J., charged the jury in part as follows:

On March 12, 1873, the U. B. Aid Society issued a certificate of membership to Edward Z. Kehler upon the life of George Fisher for \$3,000. Fisher afterwards died, and the money on that policy, at least the amount of it that has been testified to here, \$2,763.52, was paid by the society to Charles H. Meily; and this action has been brought by the administrator of Fisher, appointed after his death, to recover that money from Meily.

The question for you to determine, in this case, is whether the plaintiff, the administrator of Fisher, is entitled to recover that sum or not, or any part of it. As we have said, Kehler

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was made the beneficiary of this policy, or certificate of membership, as it is called. You heard his testimony on the stand, from which it appears that at that time Fisher was indebted to him in some amount: I understood him to say less than \$100; or, not more than \$100. How did he take the policy then? is the first question. What was the arrangement between him and Fisher? Did he take that policy as collateral security for his debt? If he did, when his debt was paid the balance of it would belong to Fisher. Or did he take it as a speculation? If he did, the balance of it would belong to Fisher, in either case, and our Supreme Court have said that where a policy is taken for as large an amount as \$3,000, and the debt that is owing at the time to the beneficiary from the person whose life is insured is \$100 or less, the Supreme Court have said that of itself is evidence that it is a speculation, a wagering policy; and that being the case, the proceeds would belong to the estate of the man who was insured.

In either case then, whether Kehler held this as collateral security, or held it as a wager policy, having a debt of less than \$100 to be secured by it, Fisher's estate would be entitled to the proceeds of the policy, less the amount of the debt and whatever Kehler paid in premiums and dues, and matters of that kind. So that Kehler would not have an absolute legal title to the proceeds of the policy; and, not having a right to the proceeds, he would not have a right to assign the policy.

He did, however, assign it. The policy was issued on March 12, 1873; and on June 6, 1874, Kehler did assign it to Meily, the defendant in this suit. As we have said, that assignment, taken by itself, would amount to nothing, for the reason that Kehler did not have a right to assign it, because he did not have a legal interest in the policy itself and its proceeds; either because he held it as collateral security, or because it was in law a wagering policy. As I understand it, Kehler assigned it in order to secure a debt that he owed to Meily. He could not have secured his debt with a policy, or the proceeds of a policy, that did not belong to him.

But the defence here say that the assignment was made with the knowledge and consent, and by agreement with Fisher. And we say to you that, if that be so, the assignment might be good. Fisher would have a right to agree, if he

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chose, that his interest in that policy should be assigned. Kehler could assign his interest; he could assign the apparent legal title to the policy, the company consenting to it, and Fisher could agree without a writing: on sufficient consideration, Fisher could agree that his interest should pass to Meily.

The next question for you to determine then is, did Fisher so agree? If Fisher did agree to it, then did he agree to it on a proper consideration, or was it a speculation? You are to determine that by finding what the consideration was. . . . Was the assignment from Fisher, or the agreement with Fisher that his interest should pass to Meily, if there was such an agreement, was it made by him honestly, and for the purpose of securing the debt that he owed, and the liability on those notes? If it was, and if the proportion to the amount which he owed, and the liability which existed, if the proportion which that bore to the amount of the policy was such that you can come to the conclusion that it was an honest and fair transaction, then it was what the parties had a right to make. . . .

In that connection we call attention to the evidence that was given as to the expectation of life of the insured, which means that on an average a person of Fisher's age, taking a thousand persons, or several thousand persons, such a person would live about 20 years. Now, in order to make a policy good for that time, the assessments would have to be paid up for all that time, and any annual dues; and, therefore, if the amount would not turn out to be the amount of that debt, it would not turn out to be a security for that debt. While he might die at any time, he might live beyond the average time, and therefore he has a right to take out a policy for a great deal more than the amount of the debt. So the jury will have to consider, then, whether, taking into consideration the fact that the policy might run a good many years before he would realize upon it, taking into consideration the proportion between the amount of the insurance and the debt, the jury are to consider whether upon the whole it is an honest transaction, taken for the purpose of securing the debt.

It is argued here by the counsel for the plaintiff that Kehler knew nothing about this arrangement between Fisher and Meily, if there was any such arrangement; and that seems to have been Kehler's testimony. You will remember that. We

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do not consider, however, that that would be conclusive against the honesty of it. That arrangement might have been made between Fisher and Meily, without Kehler's knowledge. . . .

[If you find that Fisher did transfer his interest in the policy, then you are still to consider what was the nature of that transfer; whether it was an absolute transfer, or whether it was as collateral security.]⁴ There is no writing, you remember, between Fisher and Meily, and any transfer that Fisher made, if he did make a transfer, was by word of mouth, and depends upon the testimony of the witness. [If he made an absolute transfer, and if it was an honest transfer of his whole interest in that policy, then Meily would have a right to keep all the proceeds.]¹ Meily would gain in one sense, by Fisher dying soon, and in another sense he would have lost if Fisher had lived 25 or 30 years. It might have taken the whole of the proceeds of the policy to keep up the policy that length of time.

If the transfer simply was collateral, if the agreement between Meily and Fisher was that Meily should hold Fisher's interest in this policy as collateral for his debt, so that if Fisher at any time paid the debt, that the interest was to come back, or, so that if Fisher died the balance would come back to Fisher, of course the balance would have to come back. And you will have to determine then how much Fisher owed Meily, how much it would take to make Meily whole, taking into consideration the amount of the debt, of whatever liability he incurred on behalf of Fisher, and whatever premiums he paid to keep up the policy, and all of that, and your verdict then would have to be according as you find the one and the other.

Perhaps we ought to say that Kehler says that he made the transfer for the purpose of securing his own debt to Meily. I think we have said to you that he could not transfer Fisher's interest for that purpose. Fisher might, as we have said, agree to let Kehler make the transfer, and might agree that whatever Fisher owned should go either as security for his debts, or absolutely in payment of his debts. . . .

The plaintiff requests the court to charge you :

2. At the most, Kehler's interest in the life of Fisher, and the amount which he could lawfully secure by an insurance on the life, was the amount of his debt with interest thereon for the duration of Fisher's life, according to accepted tables

Charge of Court below.

of mortality, and the necessary premiums, to secure the debt, and its interest, and the interest on such premiums, also for his life expectancy. Anything and everything beyond this amount of principal and interest and premiums and interest was speculative. Such surplus received from the aid society on the said insurance on the life of Fisher by Meily, the defendant, belongs to the estate of Fisher, and the verdict of the jury must be for the plaintiff therefor, with interest.

Answer: That is refused.⁶

3. The policy having been issued to Kehler by the aid society, Fisher lost entire control over it, or of the amount to be paid on it, during his lifetime; as the designation of the beneficiary and the issuing of the certificate to Kehler, his heirs and assigns, were a portion of the contract between Fisher, the aid society and Kehler, it was the creation of a trust in favor of Kehler, his heirs and assigns.

Answer: To that we say, it is refused in its application to this case. Fisher could not destroy any interest Kehler might have in the policy; but if the law, under the facts in this case, leaves an interest in Fisher, he could control that, at least with the consent of Kehler.⁸

4. The policy, and the insurance under it, never were the property of Fisher: they were Kehler's, without reservation, until the assignment to Light for creditors, before the indorsed assignment to Meily; and Fisher could not in any way control the policy or the designation of the beneficiary, without the consent of the party of his unhampered appointment, in this case, Light, the first assignee of Kehler, who accepted and entered on his trust as assignee for creditors; and any arrangement with Fisher and Kehler, without the assent of Light, was inoperative and void as not between the proper parties, and, if made, not binding on the estate of Fisher, whose rights attached only on the receipt of the insurance money from the aid society by the defendant.

Answer: That is refused.⁹

5. Meily took from Kehler, and the standing of Kehler in this transaction was the standing of Meily; and, as Kehler possessed no standing or rights in the insurance on Fisher's life, in question, having already assigned all his choses in action, of which this policy and insurance was one, to A. S.

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Light, as assignee for creditors, under which assignment Light got an absolute title to such chose in action, Kehler's assent to the alleged arrangement with Fisher as to the change of beneficiary, even if made, would have availed Meily nothing, and given him nothing to tack his alleged claims to, as Kehler had nothing to assent to or to give, having already parted from the ownership of the policy to Light.

Answer: That is refused.¹⁰

6. The alleged parol arrangement or promise of Fisher to give the policy and its proceeds to Meily, even if made with the assent of Kehler, did not vest in Meily the ownership of the policy and the right to the proceeds after Fisher's death. Neither Fisher nor Kehler had any right thereto or ownership therein at the time of the transfer to Meily. At the time, the policy was Light's, as assignee; the fund itself had no existence, the contingency of Fisher's death not having happened, and the good standing of the policy at Fisher's death, by reason of the compliance with the conditions, was not determined. The alleged act of Fisher would not have constituted an equitable assignment, even if made, as he had nothing to assign, and Meily could not have recovered from the aid society on it, coupled with Kehler's assignment to him, if the prior assignment by Kehler to Light had been interposed as a bar.

Answer: That is refused.⁹

9. The procuring of a policy of \$3,000 by Kehler, to cover a debt of less than \$100 was of itself a mere wager.

Answer: As we have said in our charge, that, standing by itself, would be so.⁷

10. There is no evidence upon which could be based the assumption that the policy was to be taken by Meily as an insurance to and by a creditor; but, even under the widest construction of the defendant's evidence, it was held by Meily as collateral security for certain debts, of which but one, that of Reinoehl & Meily, amounting to \$120, has been proved.

Answer: That is refused.³

The jury rendered a verdict for the defendant. A rule for a new trial having been discharged, judgment was entered on the verdict; whereupon the plaintiff took this appeal, assigning for error:

Arguments.

1. The part of the charge embraced in []¹
- 2, 3. The answers to plaintiff's points.^{2 3}
4. The part of the charge embraced in []⁴
5. The admission of Reinoehl as a competent witness.⁵
- 6-10. The answers to plaintiff's points.^{6 to 10}
11. The overruling of plaintiff's motion.¹¹

Mr. Bassler Boyer, for the appellant:

1. That the policy on the life of George Fisher was a wagering policy from its inception, cannot be questioned. No recovery against the company could have been had upon it by any person. Nor could Fisher's personal representatives have recovered from Meily or Kehler, by any proceeding in law or equity, except upon the simple implied contract created by the law directly upon the receipt of the money from the insurance company, and this liability is created solely for the purpose of enforcing the public policy which condemns such wagering transactions: *Gilbert v. Moose*, 104 Pa. 74; *Wegman v. Smith*, 16 W. N. 186; *Scott v. Dickson*, 108 Pa. 6; *Seigrist v. Schmoltz*, 113 Pa. 330; *Downey v. Hoffer*, 110 Pa. 109; *Corson's App.*, 113 Pa. 438; *Cooper v. Shaeffer*, 20 W. N. 122; *Dalbey v. Insurance Co.*, 15 C. B. 365. Fisher, accordingly, had no property in the policy, which he could dispose of even by will. His estate was purely post mortem, created by the law, and resulting from the fact of the payment made by the insurance company after his death: *Wegman v. Smith*, *supra*; *Downey v. Hoffer*, *supra*. No transfer made by him could confer on Meily the right to retain this money now.

2. At the time of the attempted assignments of the legal title from Kehler to Meily, and the alleged equitable assignment by Fisher, the legal title to the policy was in Light as assignee for the benefit of creditors of Kehler, and neither Kehler nor Fisher had any property in it, legal or equitable, which he could assign: *Benford v. Sanner*, 40 Pa. 15; *Wylie's App.*, 92 Pa. 199; *Tyson's Est.*, 2 Pears. 479; *Elliott's App.*, 50 Pa. 79; *Bliss on L. Insurance*, §§ 317, 318, 328, 331; *Schondler v. Wace*, 1 Camp. 487; *Seal v. Duffy*, 4 Pa. 277. Even if Fisher had some equitable interest in the policy, his declarations, as testified to, would be insufficient to constitute an equitable assignment: *Benford v. Sanner*, *supra*; *Wylie's*

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App., supra; Tyson's Est., supra. The arrangement between Fisher and Meily was at most, under the testimony, for security to Meily against a pre-existing liability, and it was error to submit to the jury whether there was an absolute transfer of Fisher's interest. And, moreover, as already argued, Fisher's designation of Kehler as the beneficiary left in him no property to transfer. This question is directly ruled in McCutcheon's App., 99 Pa. 137. See also Bliss on L. Insurance, §§ 317, 318. Moreover, Reinoehl was incompetent, being prima facie liable to Meily in the event of our recovery: Wheeler's Est., 8 W. N. 534; § 5, act of May 23, 1887, P. L. 158.

Mr. W. M. Derr (with him *Mr. F. E. Meily*), for the appellee.

Counsel cited: (1) As to the effect of the allegation that the title to the policy was in Light as Kehler's assignee: Berks Co. v. Levan, 86 Pa. 360; Armstrong v. Lancaster, 5 W. 68; Luckenbach v. Brickenstein, 5 W. & S. 145; Mellon's App., 32 Pa. 121. (2) As to the validity of the policy if a wagering contract: Meily v. Hershberger, 16 W. N. 186. (3) As to the insurable interest of Meily in Fisher's life: Scott v. Dickson, 108 Pa. 6; Grant v. Kline, 115 Pa. 618. (4) As to the competency of Reinqehl: Bennett v. Hethington, 16 S. & R. 195; Ott v. Houghton, 30 Pa. 453; Ferree v. Thompson, 52 Pa. 354. (5) As to the validity of a verbal assignment of Fisher's interest in the policy: 1 Am. & Eng. Ency. of Law, 835; Dunn v. Snell, 15 Mass. 481; Patten v. Wilson, 34 Pa. 299.

OPINION, MR. CHIEF JUSTICE PAXSON:

This suit was brought in the court below by John W. Shaak, administrator of the estate of George Fisher, deceased, to recover the amount of a life policy issued by the U. B. Aid Society to the said Fisher in the sum of \$3,000. The facts as alleged by the defendant and found by the jury are, that Fisher in his application directed the policy to be issued to E. Z. Kehler, as the beneficiary, and that it was so issued; that Kehler was a creditor of Fisher in about the sum of \$100, and had therefore an insurable interest; that Kehler paid the premiums for some time and then assigned the policy to Meily, the defendant, who was a creditor of Kehler; that Meily, and also

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the firm to which he belonged, Reinoehl & Meily, were also creditors of Fisher, the assured; and that Fisher assented orally to the transfer from Kehler to Meily. Upon the death of Fisher the aid society paid the money over to Meily, and this suit was brought by the administrator of Fisher to recover it from Meily. The principal grounds upon which this claim was rested were, (a) that as to Kehler it was a gambling policy; (b) that no title passed from Kehler to Meily, because the latter, while the holder of the policy, had made an assignment for the benefit of his creditors, and that by reason thereof the policy, as a chose in action, passed to his assignee; and (c) that, in any event, the policy being a mere gambling transaction, Fisher had no such interest or control over it as enabled him to consent to its transfer by Kehler to Meily. The two last propositions may be dismissed with the remark that each of them is a two-edged sword; for, if the policy passed by Kehler's assignment to his creditors, what interest or right has the administrator of Fisher in it? And, if Fisher had no such interest in it as to give him the right to assent to its transfer to Meily, it is equally difficult to see the interest of his administrator. The first proposition has been negatived by the verdict, so that, unless some error is apparent upon the trial, the judgment must stand.

A careful examination of the charge and the answers to points fails to disclose any substantial error in that part of the case. The fifth assignment alleges that the learned court erred in permitting, against objection, the witness Reinoehl to testify as to conversations with Fisher occurring during his lifetime. The ground of the objection was that this was a suit by the administrator of Fisher, and that the witness was interested. As I understand the case, when Meily received the assignment of the policy he assumed the debt due by Fisher to his firm, and it was charged up against him on the books thereof. The witness was examined on his voir dire as to his liability to pay any portion of the money back to Meily in case a judgment was recovered against him in this suit, and he flatly denied any such engagement or liability. I am unable to see how the witness can be affected by the verdict in this case. He expressly stated, "Now it is optional with me whether to assume that debt or not." When the witness Reinoehl was called, his

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competency was objected to by the plaintiff, who endeavored to prove his interest aliunde and for this purpose called E. Z. Kehler to the stand. This witness did not prove anything, however. The court then called the witness Reinoehl and examined him on his voir dire, with the result as before stated. It will be noticed that the only objection to the witness was to his competency. No exception appears to have been taken to the manner in which the competency of the witness was established. The eleventh assignment alleges that the court erred in not striking out the testimony of several witnesses, as well as a large portion of the documentary evidence; indeed, pretty much all that was of value to the defendant's case. The learned judge did not see his way clear to do this, in which we think he was right.

Judgment affirmed.

ISAAC GAINES v. M. BROCKERHOFF ET AL.

APPEAL BY DEFENDANTS FROM THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY.

Argued April 23, 1889—Decided June 2, 1890.

Re-argument refused November 10, 1890.

[To be reported.]

1. Where a cause in equity is dependent upon oral testimony, it is the proper practice to refer it to a master for a report upon the facts; but the province of the master is merely ancillary, and his work is simply in aid of the court in the performance of its own functions: Phillips's App., 68 Pa. 130.
2. When, therefore, a master's report comes before the court upon exceptions thereto, so long after the taking of the testimony that the master could have little assistance from his recollection of the appearance and manner of the witnesses, it is not error for the court to find the facts from the testimony reported and enter a decree thereon: Herdic's App., 58 Pa. 212.
3. An agreement made between a debtor and his creditor that the latter will acquire title to the lands of the debtor by means of a sheriff's sale, and will hold them with the right in the debtor to redeem, may constitute the transaction a mortgage unaffected by § 4, act of April 22, 1856,

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P. L. 533: *Harrison v. Soles*, 6 Pa. 393; *Rhines v. Baird*, 41 Pa. 256; *Saunders v. Gould*, 134 Pa. 445.

4. Such an agreement, if established by sufficient evidence, carried out according to its terms by advances on the part of the creditor and acts to his injury on the part of the debtor on the faith thereof, is enforceable in equity against the creditor: *Sweetzer's App.*, 71 Pa. 264, followed; *Fox v. Heffner*, 1 W. & S. 372; *Jackman v. Ringland*, 4 W. & S. 149, and *Kimmel v. Smith*, 117 Pa. 183, distinguished.
5. Grantees of the purchasing creditor, his widow and children, by a deed with but a nominal consideration, not describing the lands in dispute, and, by the testimony of one of the grantees, not intended to include them, have no better standing to contest the debtor's claim under the agreement than their grantor to whose rights they succeeded.
6. A parol defeasance, sufficiently proven, being the equivalent of a written one,* though a bill filed to enforce the debtor's rights averred that the agreement was in writing, but that established by the proofs was in parol, the variance was technical rather than substantial, and, if necessary, an amendment is permissible at any stage of the proceeding.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

No. 12 January Term 1889, Sup. Ct.; court below, No. 4 January Term 1883, C. P. in Equity.

On September 28, 1883, Isaac Gaines filed a bill in equity against Margaret Bockerhoff, widow, Andrew J., Henry W., and Joseph M. Bockerhoff, heirs, and Margaret Bockerhoff and Andrew J. Bockerhoff, administrators, of Henry Bockerhoff, deceased.

The bill averred, in substance, the financial embarrassment of the plaintiff in 1870, and threats of creditors to enforce their claims; that the plaintiff was then indebted to Henry Bockerhoff in the sum of \$5,928.09 and interest from February 17, 1868, on a judgment entered in Clearfield and Centre counties, which was a first lien upon seven tracts of land, four in Clearfield and three in Centre county; that in October, 1870, to prevent a sacrifice of his property, the plaintiff entered into an agreement with Henry Bockerhoff, in writing, drawn by and left with Mr. William A. Wallace, to the effect that Bockerhoff would buy in all the plaintiff's property at sheriff's sale and hold it for the plaintiff's benefit, sell off parts thereof, and the timber, the money realized to be applied to Bockerhoff's

* See act of June 8, 1881, P. L. 84.

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claim and expenses, and the latter, when reimbursed, to re-convey such lands as remained unsold to the plaintiff; that said Mr. Wallace did not have said agreement, but had made search for it and could not find it, and therefore the plaintiff was unable to append a copy of it, but expected to prove its execution and contents. The bill then proceeded to aver that the agreement was carried out in good faith, and in pursuance of it Brockerhoff purchased plaintiff's property, real and personal, at sheriff's sale, for an aggregate sum of \$790 which was applied to his judgment; that after plaintiff's properties were so purchased, he remained in possession, kept the personal property and disposed of the same to his own use, and in Brockerhoff's lifetime the plaintiff had entire charge of the real estate, and nothing was done pertaining thereto without his approval; that plaintiff had made sales of timber and of land, to John Heise, to J. S. & A. O. Furst, and to David Price, and had paid all the purchase money to Brockerhoff, and that the money realized out of the property by Brockerhoff, in his lifetime, and by his representatives after his death, aggregated \$10,467.50; that by deed dated February 20, 1878, Henry Brockerhoff conveyed to Mary C. Brockerhoff, for the consideration of one dollar, all the lands owned by the grantors in Pennsylvania whether specifically described or not, describing thirteen tracts, however, but not the lands claimed by the plaintiff; that by a trust deed dated February 21, 1878, Mary C. Brockerhoff conveyed the same lands to Margaret Brockerhoff, widow, Andrew J. Brockerhoff and Henry W. Brockerhoff, sons of Henry Brockerhoff, in trust to receive the rents, issues and profits for ten years, to apply the same or so much as might be necessary to pay Henry Brockerhoff's debts, and after payment of the same to divide the residue of the rents, issues and profits equally between Margaret Brockerhoff, Andrew J., Henry W., Joseph M. and Mary C. Brockerhoff, and at the expiration of said ten years to sell said real estate and divide the proceeds, etc.; that said Henry Brockerhoff had died intestate without providing for a re-conveyance to the plaintiff, who had fully performed the agreement referred to; and that certain tracts remained unsold and were of the total value of \$40,000. The prayers of the bill were: 1. For an injunction restraining the defendants from selling the lands de-

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scribed in the bill. 2. That the administrators of Henry Brockhoff, deceased, be required to make a deed conveying said lands to the plaintiff. 3. For an account. 4. For general relief. Before answer, the bill was amended, by leave of court, so as to include an averment that defendants, before the death of Henry Brockhoff and before the making of the deed of February 20, 1878, had notice of the agreement of October, 1870, and of the plaintiff's rights thereunder.

An answer having been filed, denying, inter alia, all the averments of the bill as to the agreement of October, 1870, and that Brockhoff had purchased at the sheriff's sale under an agreement to hold the property, or any of it, for the plaintiff's benefit, either directly or indirectly, issue was joined; and, on June 10, 1884, the cause was referred to *Mr. Joseph W. Parker*, as examiner and master, who on February 27, 1888, filed a report, in which he found certain facts and proceeded:

The master is of the opinion that the evidence fails to support the allegation of the bill as to the written contract, and he consequently finds that it is not proved that it ever had an existence.

It is contended, however, by plaintiff's counsel "that in cases where parties reduce their contract to writing, the writing is not the contract itself, but merely the evidence of it; the agreement is oral, and its terms are evidenced and perpetuated by the writing; and, if in this case the master should be of opinion that the evidence is not sufficient to prove that there was a written agreement between the parties creating an express trust, complainant is still entitled to the relief prayed for, if the evidence is such as to make out a case of implied or resulting trust arising from a parol agreement and the conduct of the parties thereto, the same as if said parol agreement and resulting trust had been charged in the bill."

Section 4, act of April 22, 1856, provides: "That all declarations or creations of trusts or confidences of lands, tenements, and hereditaments, and all grants and assignments thereof shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or else to be void: Provided, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise

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or result by implication or construction of law, or be transferred or extinguished by act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as if this act had not been passed."

The statute recognizes two kinds of trusts: First, an express trust manifested by writing; and, second, an implied or resulting trust arising by implication of law. The Supreme Court has defined the latter to be "a trust raised only from fraud in obtaining the title, or from payment of the purchase-money when the title is acquired:" *Barnet v. Dougherty*, 32 Pa. 371.

"It is an elementary principle that the bill should state the right, title, or claim of the plaintiff with accuracy and clearness; in other words, there should be such certainty in the averment of the title upon which the bill is founded, that the defendant may be distinctly informed of the nature of the case which he is called upon to meet:" *Story's Eq. Pl.*, § 241, p. 253.

In the bill under consideration, the plaintiff bases his claim for relief upon a written agreement. It does not charge fraud upon Brockerhoff in obtaining the title, or that payment of the purchase-money was made by Gaines. It asserts that the contract was carried out in good faith by the parties thereto. The plaintiff must stand or fall upon the averments of his bill; and, having failed to establish the written agreement as therein set forth, he cannot obtain recognition of an alleged unwritten agreement, imputing fraud to the defendant and seeking to convert him into a trustee *ex maleficio*. Such claims, it seems to us, are inconsistent with and repugnant to each other; and therefore, equity will not lend its aid to enforce in this proceeding the execution of the alleged resulting trust.

While it is no longer open to controversy that a deed absolute upon its face may be held to be a mortgage, and that this may be shown by oral testimony, yet we are of opinion that the plaintiff, having failed, as before stated, to maintain his allegation of a written agreement, cannot be permitted to fall back from the position taken in his bill, and set up a parol contract in the light of which it might appear that the parties sustained to each other the relation of mortgagor and mortgagee.

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—The master, therefore, recommended a decree that the bill be dismissed at the plaintiff's costs.

Exceptions filed by the plaintiff to the report of the master, both as to his findings of fact and his conclusions of law, were overruled by the master and renewed on the filing of his report. After argument thereof, the court, KREBS, P. J., on July 12, 1888, filed an opinion which, in part, was as follows:

This case comes before the court on exceptions to the master's report, for alleged errors both in law and in his failure to report fully all the facts covered by the testimony taken before him. The length of time elapsing since the filing of the bill, the importance of the cause, and the delay inevitably consequent upon a reference to the master again, has impelled me to find, at length, the facts as shown by the testimony, in order that an end may be reached and the rights of the respective parties ascertained and finally determined.

The master, having arrived at the conclusion that, as the complainant had alleged in his bill that a written agreement was made between himself and Henry Bockerhoff, since deceased, and there was no sufficient proof of the existence of such written agreement, proceeded to decree a dismissal of the bill, without passing upon any of the other questions arising under the complainant's offers of testimony. The master's conclusions of law and fact may be right; and yet the complainant is entitled to have the whole of his case set forth in the report, in order that delay may be avoided and the case disposed of upon one hearing and not piecemeal. In view of this, I have determined, at the expense of much time and labor, to sift the evidence and set out such facts as seem to me to be fully established, before passing upon the questions of law involved in the master's report and the case when considered in full.

—The court then proceeded with a finding of facts, *inter alia*, as follows:

5. The lands described in paragraphs 1, 2, 3, 4, of the bill were sold at sheriff's sale to Bockerhoff on January 13, 1871; and those described in paragraphs 5, 6, 7, situate in Centre county, were sold to Bockerhoff on December 5, 1870. The bids for all these lands in the aggregate amounted to \$635. The personal property of Gaines had also been sold on exe-

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cution to Brockerhoff on November 3, 1870, for \$155. All these lands, both in Clearfield and Centre counties, were sold upon writs of fieri facias issued upon the judgment of Brockerhoff; Gaines, the defendant therein, having waived inquisition.

6. The personal property was left with the complainant, Isaac Gaines, and at no time taken possession of by Mr. Brockerhoff; whether there was much or little personal property could only be ascertained by reference to the sheriff's levy and return of sale, neither of which is set out in detail by the master's notes of the testimony.

7. Henry Brockerhoff died on October 6, 1878, and letters of administration were issued to Margaret Brockerhoff, widow, and Andrew J. Brockerhoff, his eldest son.

8. At the time of the sheriff's sale of complainant's property, he was indebted; as shown by judgments entered of record, to an amount of nearly \$2,500, in addition to the amount of the judgment held by Brockerhoff of \$5,928.09 aforesaid, and writs were in the sheriff's hands on part thereof.

9. An arrangement or agreement was made between Mr. Brockerhoff and Isaac Gaines before the sheriff's sale was had, and some time prior, how long does not appear, that Mr. Brockerhoff would buy the property at sheriff's sale, and that upon repayment of the judgment of Brockerhoff and the moneys in that behalf expended by him, Gaines should have it again.

This being upon a vital point in the case I set out more particularly the reason or proofs in support of this finding:

(a.) Letter of Mr. Brockerhoff to Isaac Gaines, dated November 21, 1871, as follows:

"Mr. Isaac Gaines. Dear Sir. I wrote to Wallace & Fielding to send me the deeds of property of yours in Clearfield county, bought in for me as we have agreed upon. He sent me the following deeds: I perceive that there is no deed for one hundred acres, which formed a part of your property in Karthaus, and which ought to have been sold along with the rest; will you please inform me how it came that the whole was not sold," etc.

(b.) Hon. W. A. Wallace testifies: I was attorney for Henry Brockerhoff some time in 1860 until some time in 1874 or 1875, etc. I and my firm had charge of his judgments and claims in this county for collection, including those against

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Isaac Gaines. The property of Isaac Gaines, real and personal, was pressed to sale by his creditors including Mr. Bockerhoff, I think some time in 1871 or 1872. I think previous to the sale, I understood from the parties, both Mr. Bockerhoff and Mr. Gaines, that if Gaines paid the debt and costs with the expenses to Mr. Bockerhoff, he was to have the property returned. They were together in my office at one time, and discussed the subject. My impression was that it was after the sale, but I cannot fix the date. In the talk had in my office, the arrangement talked of before the sale was repeated, that is, if Isaac paid the debt the property was to be his again. I have no written paper that was signed by the parties at the time. I have searched in my office carefully, but cannot find it. My recollection is not distinct enough to say that there was any such paper either written or signed.

—Other testimony reported by the master, upon the subject of the agreement, was then considered, when the court proceeded:

10. Henry Bockerhoff and Margaret his wife conveyed, by deed dated February 20, 1878, in consideration of one dollar, to Mary C. Bockerhoff, his daughter, "all the messuages, tenements, and lands owned by the said Henry Bockerhoff and Margaret his wife, situate in the state of Pennsylvania, whether therein specifically described or not." This deed contains specific description of thirteen tracts, but does not specifically describe the lands in dispute or any of them.

11. Mary C. Bockerhoff, the grantee mentioned in preceding paragraph, by her deed dated February 21, 1878, conveyed to Margaret Bockerhoff, her mother, and to Andrew Bockerhoff and Henry W. Bockerhoff, her brothers, the same property (described exactly as in the deed to her), and to the survivors or survivor of them, the same lands, in consideration of one dollar, and upon certain express trusts, inter alia, to pay debts of Henry Bockerhoff, the father, etc.

12. At the time of the sheriff's sale of the property of Isaac Gaines, the complainant, for the sum of \$635, it was reasonably worth from \$12,000 to \$15,000, in payments on reasonable time, and there is no evidence that any one was prevented or induced not to bid at the sale.

13. The complainant has at all times before and since the

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sheriff's sale of the property described in paragraphs 1 and 2 of appendix to his bill, had the actual possession thereof, and no demand for rent or for money for the use thereof has ever been made upon him to the time of the filing of his bill; he has erected thereon valuable improvements, without objection from Mr. Brockerhoff, paying therefor himself; cut timber therefrom, to the extent at least of one small raft, and still continues in the use and enjoyment thereof.

14. The allegation in complainant's bill that the agreement with Henry Brockerhoff was in writing, is not sustained by sufficiently clear and precise proof, and is not sustained as a fact by these findings.

—The court followed with findings of fact as to sales of timber from the lands after their purchase by Brockerhoff at sheriff's sale; sales of land itself; and the conveyance by Gaines to Brockerhoff, or rather to Furst, Brockerhoff's vendee, in consideration of one dollar, of Gaines's interest in land for which Brockerhoff received \$1,300, and which had not been sold to Brockerhoff at sheriff's sale, but was the land referred to in Brockerhoff's letter to Gaines dated November 21, 1871. The court then proceeded:

The complainant's counsel contended on the argument that the facts involved in the testimony prove that Mr. Brockerhoff is to be held liable to account either: 1. As a trustee *ex maleficio*; or, 2. Because the transaction is a *parol mortgage*.

Respondent's counsel contended that the bill must be dismissed for these reasons, namely: 1. Because the complainant alleged in the bill that the agreement was in writing, and he is thereby barred from recovering on a *parol agreement*. 2. That the contract alleged is against public policy and void, having been made to hinder, delay, and defraud his creditors. 3. Because the respondents are *bona fide* purchasers for value without notice. 4. Because the evidence is not sufficient to make Mr. Brockerhoff a trustee *ex maleficio*. 5. Because no *parol mortgage* can be created through the medium of a sheriff's sale, and, even if this be untrue, the evidence is not sufficient to find that the transaction was a mortgage.

1. The contention of respondents' counsel in their first proposition raises a question of equity pleading.

It is a fundamental rule of equity pleading that every fact

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essential to the plaintiff's right to maintain the bill and obtain the relief sought must be stated in the bill, otherwise the defect will be fatal. For no facts are properly at issue unless charged in the bill, and of course no proofs can be generally offered of facts not in the bill. Nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleading and evidence; for the court pronounces its decree *secundum allegata et probata*: Story's Eq. Pl., § 257. So, also, it is said "that the bill in the first place must show clearly that the plaintiff has a right to the thing demanded, or such an interest in the subject-matter as gives him a right to institute suit concerning it:" Daniels' Ch. Pr., 312. Again; "Care must be taken in framing the bill that everything which is intended to be proved be stated upon the face of it; otherwise evidence cannot be admitted to prove it:" Daniels' Ch. Pr., 326.

The complainant charges in the second paragraph of his bill that an agreement was made with Mr. Bockerhoff and that the agreement was reduced to writing, and in the third paragraph he charges that it was left with Mr. Wallace for the benefit of both parties thereto. Upon the hearing before the master, Mr. Wallace testifies distinctly that an agreement or arrangement was made between the complainant and Mr. Bockerhoff; he is unable to say whether it was put in writing, and is unable to find it, if it was. Two or three witnesses are called to prove that Mr. Bockerhoff admitted that there was an agreement in writing, but their testimony is not of that clear, precise, and unquestioned character, so as to establish the fact that it was in writing. The master so found, and in this respect I agree with him; but the master thereupon proceeded to dismiss the bill, and in this respect I find myself unable to agree with him. The relief prayed for can be granted whether the contract is by parol or in writing. It is no ground of refusal that it is in parol, if the proof sufficiently establishes it, and there has been an actual, entire, or part performance of it, or if the facts proven bring it within the authorities.

That a parol contract was made cannot be questioned: the evidence of its terms is clear and strong; the relief sought would be the same as if the contract was laid before us in writing. The provisions of the alleged written agreement as

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charged, differ in no essential from the provisions of the parol contract. Leaving out of mind the liberal allowance of our courts in the amendment of pleadings and procedure, I deem the proposition so technical that it ought not to prevail, even under the former strictness of pleading. And, as said before, the relief that could and would be granted if the agreement was laid before the court in writing, would not differ from the relief that must be granted under the parol agreement, if it is found to be within the equitable power of the court to recognize it. The respondents are therefore put to no disadvantage in the relief flowing out of the transaction. The essential purposes of the agreement, whether written or parol, are the same: to give the complainant an opportunity to redeem his property. The mode of establishing the right is alone the difference. . . .

I believe it to be well established in our state that in a court of equity relief will be granted where the evidence shows any case requiring the interposition of the court, and the relief sought is supported by the evidence, although not strictly coming within the charging part of the bill, but embraced in what is charged: *Slemmer's App.*, 58 Pa. 168; *Masson's App.*, 70 Pa. 26; *Tolles' App.*, 110 Pa. 331; and *Tolles' App.*, 22 W. N. 1. But if the master's position be correct and my view be wrong, still, under the rules and practice of amending bills as now so liberally construed and applied by the Supreme Court, this technical point ought not to prevail.

2. Is the transaction disclosed by the evidence within the objection that it was made to defeat, hinder, or delay creditors? The evidence is entirely barren of anything tending to show this. The complainant's creditors had their judgments of record. Some of them had writs in the sheriff's hands. They were in no way prevented from or induced not to bid at the sale. There is no evidence of fraud practiced, or misrepresentation made, that caused them not to bid the property to something near its real value, and in no respect is this case within the class of cases where relief has been denied because the sheriff's sale was made the medium of perpetrating a fraud by hindering, delaying, and defrauding the creditors of the defendant in the execution. And I cannot sustain this proposition and dismiss it, without more to show that it is not well taken.

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3. Are the respondents bona fide purchasers for value without notice? They take title under a deed from Mary Brockerhoff, a daughter of Henry Brockerhoff. The consideration is one dollar, and subject to certain trusts therein specified. Mary Brockerhoff receives her title from her father, Henry Brockerhoff, and it is also in consideration of one dollar, but without any trusts named therein. It is of no materiality that she received her deed apparently on February 20, 1878, and conveyed to her mother and brothers on February 21, 1878. These deeds, in my opinion, have no greater force and effect than that of voluntary conveyances, and the grantees in each are subject to the rights of the complainant, if it be contended that it was intended to include within the grant and to convey the title to the lands in dispute. The contention that the respondents are bona fide purchasers for value cannot, in my opinion, be sustained.

4, 5. This brings me to the consideration of the important questions in this case. If either of these propositions be true, then the complainant is without remedy, and the bill must be dismissed. I will consider them together, as they cover a discussion of the facts in the whole case, and are so interwoven that they cannot be separated. . . .

It is contended that under the fourth section of the act of April 22, 1856, such a parol agreement is void and cannot be enforced. The difficulty with this argument is, that the trust arising under these facts, if it be a trust, is one within the proviso of this fourth section, and the section therefore has no application to the case. These implied or resulting trusts may arise in different ways, as where lands are purchased with the money of another; where a trustee purchases land with the trust funds; where a joint owner purchases an outstanding title; where a trustee becomes a purchaser of the trust estate at his own sale; or, where a party becomes a trustee *ex maleficio*, by reason of his fraud in refusing to carry out the purposes of the deed or will by which he obtained the title. Under this latter clause an apt illustration is found and the law fully declared by SHARSWOOD, J., in *Church v. Ruland*, 64 Pa. 432, and *Harper's App.*, 64 Pa. 315.

If this be a trust, then, resulting by implication or construction of law, the fourth section of the act of 1856, does not ap-

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ply, and the relief sought can be granted, unless the remedy is barred by the limitation fixed in the sixth section of the act of 1856.

The sixth section provides:

Under this section of the act of 1856, it is decided that the limitation does not bar the right of action where the cestui que trust has possession whilst the limitation would otherwise be running: *Williard v. Williard*, 56 Pa. 119. Here Gaines was in the actual possession of the farm lands and so continues to this day. As to the timber lands, the possession of Mr. Brockerhoff was co-equal and not greater than that of Gaines. The fixing of the prices at which it should be sold, the renting of the building spoken of as a hotel, and the general management of the land was the joint act of them both, Mr. Brockerhoff receiving the moneys arising from the sales and rents, and Gaines and Brockerhoff together fixing the prices. And I am strongly of the opinion that if the facts found make Mr. Brockerhoff a trustee, then the possession of Gaines was such that the limitation does not bar the relief asked for.

It was argued very earnestly by respondents' counsel that this was a bill for specific performance of a contract, until the counsel for complainant admitted that if it was they were without remedy. But it is clear that it cannot be treated as a bill for the specific performance of a contract for the sale by Mr. Brockerhoff of any real estate. The contract must be for the sale of real estate. The agreement in question is in all its essential parts for a right of redemption, and not for a purchase and sale, and the limitation, for that reason, does not apply. Neither is it an action for damages for non-compliance with any such contract. No more is it an action to enforce an equity of redemption after re-entry for condition broken. True, the complainant may be said to be asking for the enforcement of an equity of redemption, but not after "re-entry for condition broken." If it applies at all, it is because the bill seeks to "enforce an implied or resulting trust as to real estate."

We have seen in the twentieth and twenty-first finding of facts that Gaines, in pursuance of the agreement testified to by Senator Wallace, to enable Mr. Brockerhoff to complete the sale to Judge Furst, parted with his own title to one hun-

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dred acres of land of the value of \$1,300 or more, and without a particle of consideration flowing to him, unless the agreement he had made with Mr. Brockerhoff was being faithfully performed. In addition to this, he released the lien of a judgment, or had it assigned in such a way as to perfect the title. He paid the purchase-money due Flegal after the sheriff's sale of his equitable title to Mr. Brockerhoff, in amount \$1,500 or thereabouts, which could only be explained on the ground that it was on the faith of the agreement between himself and Mr. Brockerhoff. These payments thus made, one directly to Mr. Brockerhoff which must be applied to the debt of Gaines to Brockerhoff, or he now absolutely lost to Gaines, and the other indirectly to Mr. Brockerhoff, because largely increasing the value of the Flegal property as security to him, in my opinion constitute such part and substantial performance of the agreement as bars the running of the statute if this be held a trust.

But upon this question, there is another point. The letter of Mr. Brockerhoff to Gaines, dated November 21, 1871, has the language: "I wrote to Wallace & Fielding to send me the deeds of the property of yours in Clearfield County bought in for me as we had agreed upon." This declaration can only have reference to the agreement testified to by Senator Wallace. Is this not a sufficient acknowledgment in writing of the subsistence of that agreement, coupled with the account shown on Mr. Brockerhoff's books, to take this case out of the bar of the limitation, and that without doing violence to the rights of the parties?

I do not find any decided case where the rule has been settled to what extent the writing must go. I do not believe that it was intended by this clause to declare that the writing must contain the details of the agreement, or its terms. If it was vital in this case, I would decide that the letter of November 21, 1871, taken with the other facts, was a sufficient acknowledgment of the subsistence of the agreement for the right to redeem, and that the sixth section of the act did not apply; but what is more to the point, it does seem to me that the facts under which these sheriff's deeds were made to Mr. Brockerhoff, taken with what took place between the parties afterwards, are entirely sufficient, on account of the refusal of the

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respondents to permit Gaines to redeem the property, to establish a vice and fraud relating back to the inception of the title of Mr. Bockerhoff, and to constitute him a trustee ex maleficio by reason thereof.

It was contended on the argument, by the complainant's counsel, in reply to the argument of the respondents' counsel, that even if the facts would not justify the court to hold Mr. Bockerhoff liable under the evidence as a trustee ex maleficio, he and the respondents claiming under him, either as heirs at law or under the voluntary conveyances mentioned, were liable to account because the transaction was in all its essential parts a mortgage by parol. The question then arises can a parol mortgage exist or be created through the medium of a sheriff's sale, or, to speak more clearly, can a sheriff's deed be converted into and shown by parol to be no more than a mortgage in effect.

A mortgage exists wherever real estate is granted conditionally, it is true; but until the condition is performed, the title and possession are as substantial and real as though they were absolute. The evidence of this is, that the mortgagee may dispossess and hold out the mortgagor until he performs the condition, or until the perception of the profits reaches the same result. It is in form, when reduced to writing, a defeasible deed, and in substance a grant of a specific security, or an interest in land for the purpose of security: *Tryon v. Munson*, 77 Pa. 250.

In our case, the Crissman & Sons judgment, debt, interest, and costs amounting to \$565 or thereabouts, was a lien prior to Mr. Bockerhoff's. His agreement to buy in Gaines' property at sheriff's sale and allow him to redeem it upon payment to him of what Gaines owed him, and the moneys he had to expend in that behalf, must have contemplated the advance of the amount at least of this Crissman & Sons judgment. The fact is, he paid this judgment, and it appears as a charge against Gaines in the account on his book. Here, then, is an essential fact existing undisputed, which is necessary to constitute the groundwork of a mortgage. An advance of moneys and the judgment of Mr. Bockerhoff are the consideration for the agreement that Mr. Bockerhoff would buy in the property at sheriff's sale, and that it should be reconveyed again to Gaines

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when Brockerhoff received his own debt and moneys paid out under the sheriff's sale. . . .

But, while there are cases which seem to decide that a sheriff's deed may not be converted into a mortgage, of which *Fox v. Heffner*, 1 W. & S. 372; *Barnet v. Dougherty*, 32 Pa. 371; *Kellum v. Smith*, 33 Pa. 158; and *Kimmel v. Smith*, 117 Pa. 183, are the most notable, yet there are cases where it is decided that the sheriff's deed may have and does have no greater force than a mortgage: *Sweetzer's App.*, 71 Pa. 264, and *Harrison v. Soles*, 6 Pa. 393. . . .

The respondents take under voluntary conveyances. They stand in no better position than Mr. Brockerhoff would if living. He bought this property at sheriff's sale under an arrangement by which Gaines was to have the right to redeem, for a grossly inadequate price. He received a large portion of his own debt and the money he advanced, by the perception of profits and the payment of moneys arising from the sale of Gaines' title to other lands to Judge Furst, in his lifetime, if not all of it; and it is but just to his reputation and memory to say, that had he lived, the arrangement would have doubtless been carried out by him. The respondents have a right to know that the complainant is not insisting upon a claim having its inception in wrong; but, if he makes out a just claim, it is doing no violence to their rights and equities to grant him relief.

Whether the arrangement made and so conclusively established be held to constitute a mortgage or a trust *ex maleficio*, in my opinion makes no material difference; the sixth section of the act of April 22, 1856, does not apply. Whether right or wrong the conviction forces itself on my mind that the complainant is entitled to an account and that the master erred in dismissing the bill. In reaching this conclusion I have endeavored to state every point raised by counsel as well as those not discussed, in order that a higher court may see the whole case. If I have reached a wrong conclusion, no one will more readily concur in the judgment of the court, or regret that my error may have caused the expenditure of moneys to correct them.

I now proceed, therefore, to state an account as I gather the items from the testimony:

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Thereupon, the court stated an account, and found as a conclusion that the plaintiff was entitled to a decree for a reconveyance of the residue of the lands bought at sheriff's sale by Brockerhoff, and for the payment by the defendants to the plaintiff of \$602.82, with interest from June 1, 1888. A final decree having been entered, the defendants took this appeal, filing a large number of assignments of error the nature of which is shown in the briefs of the argument.

Mr. J. W. Gephart and Mr. Frank Fielding (with them Mr. James A. Beaver), for the appellants:

1. The court erred in setting aside the findings of the master, and in undertaking to find the facts without a reference back to the master. We believe the practice is well settled, that "in all cases in equity where there is a contrariety of the testimony, the case must go to a master, and his report must come up on the appeal. His finding of facts is somewhat like a special verdict and must not be omitted. Its soundness is tested on exceptions in the court below, and the decision on these exceptions comes before this court. One portion of the grounds against error, in equity cases, is unemployed, when a court undertakes to decide on the testimony itself:" Clark's App., 62 Pa. 447. See, also: Atkinson's App., 22 W. N. 7; Phillips's App., 68 Pa. 188.

2. The court erred in not holding with the master that the failure of the plaintiff to prove a written agreement, as alleged in the bill, was an end of the plaintiff's case. Every averment necessary to entitle the plaintiff to the relief sought, must be contained in the charging part of the bill, and may not be supplied by inference or reference to some other part: Wright v. Dame, 22 Pick. 55; Brinkerhoff v. Brown, 4 Johns. Ch. 671; McElwain v. Yardley, 9 Wend. 549. A party is not allowed to state one case in a bill or answer, and make out a different one by proof: Boone v. Chiles, 10 Pet. 207; Foster v. Goddard, 1 Black 506; Hardy v. Hardy, 11 Wheat. 108; Winebrenner v. Colder, 43 Pa. 251.

3. The court erred in holding that, though the plaintiff had failed to prove the written agreement alleged by him and upon which his bill was founded, yet he was entitled to recover, if he established a verbal agreement or understanding of similar

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import. (a) Mr. Brockerhoff having bought with his own money, the lands became his absolutely, unless he had entered into a written contract to reconvey upon being reimbursed. (b) A verbal agreement, made before or at the time of the sheriff's sale that he would buy and permit Gaines to redeem, would not be enforced either at law or in equity, as being within the statute of frauds. (c) Section 4, act of April 22, 1856, P. L. 533, is a complete bar to the plaintiff's right to a decree.

4. (d) There is no averment in the bill, or proof in the evidence, indicating or even intimating that Brockerhoff procured the sheriff's title by such fraud or bad faith as would make him a trustee ex maleficio. (e) And the provisions of § 6, act of April 22, 1856, P. L. 533, cannot benefit the plaintiff in any way, because he did not move to enforce his alleged right, and because there was no entry or possession, part performance, or acknowledgment in writing signed by the party to be charged, within five years after such alleged right accrued. These propositions are sustained by *Kellum v. Smith*, 33 Pa. 158; *Barnet v. Dougherty*, 32 Pa. 371; *Bennett v. Dollar S. Bank*, 87 Pa. 382; *Kistler's App.*, 73 Pa. 393; *Kimmel v. Smith*, 117 Pa. 183; *Brickell v. Earley*, 115 Pa. 473; *Salsbury v. Black*, 119 Pa. 200.

5. A resulting trust in land can be raised only from fraud in obtaining title thereto, or from payment of the purchase money when the title is acquired: *Bickel's App.*, 86 Pa. 204; *Nixon's App.*, 63 Pa. 279; *Cross's App.*, 97 Pa. 471. In cases of parol sales, where the attempt is to evade the statute of frauds by converting the vendor into a trustee for the vendee, by partial execution, it has been repeatedly held to be the duty of the court to exclude all the evidence if insufficient to make out such a case as would induce a chancellor to decree a conveyance: *Brawdy v. Brawdy*, 7 Pa. 157; *Poorman v. Kilgore*, 26 Pa. 371. A simple avowal by a purchaser at a sheriff's sale, whether made at the time of the purchase or afterwards, that the purchase was for another, will not support an allegation of a trust: *Carhart's App.*, 78 Pa. 100.

6. The court erred in holding, in effect, that the sheriff's deeds to Brockerhoff were but mortgages, and conveyed but a defeasible estate subject to an equity of redemption in Gaines.

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But, to convert an absolute deed into a mortgage by parol testimony, such testimony must be clear, explicit and unequivocal: *Nicolls v. McDonald*, 101 Pa. 514; *Burger v. Dankel*, 100 Pa. 118; *Plumer v. Guthrie*, 76 Pa. 441. And, when one buys real estate at sheriff's sale, under a verbal agreement with the debtor as whose property it is sold, to hold it in trust for him, with the right in the latter to redeem, the transaction is not a mortgage, and does not give the debtor the rights of a mortgagor: *Kimmel v. Smith*, 117 Pa. 183; *Fox v. Heffner*, 1 W. & S. 372; *Jackman v. Ringland*, 4 W. & S. 150. *Sweetzer's App.*, 71 Pa. 264, and *Harrison v. Soles*, 6 Pa. 393, are distinguishable.

Mr. Thomas H. Murray (with him *Mr. Cyrus Gordon*), for the appellee:

1. The action of the court in finding the facts without a reference back to the master was legal, and, under the circumstances, entirely proper. What shall be referred to a master is a matter in the discretion of the court; his province is merely ancillary, and his report is neither a decision nor an infallible guide, but an instrumentality to aid the court in the performance of its own functions: *Philips's App.*, 68 Pa. 130, 138.

2. The allegation of a written contract is not such a material allegation, as that failure to prove it defeats the plaintiff's right to recover. This is not the case of specific performance of a contract, but an assertion of a constructive trust or a parol mortgage, and neither a contract in writing nor an express verbal contract is essential; the right to recover may be a matter of inference from well proven facts or attendant circumstances: 1 *Perry on Trusts*, § 227; *Williard v. Williard*, 56 Pa. 125; *Crawford's App.*, 61 Pa. 52; *Seichrist's App.*, 66 Pa. 241; *Rhines v. Baird*, 41 Pa. 263; *Sweetzer's App.*, 71 Pa. 273; *Plumer v. Guthrie*, 76 Pa. 441.

3. Under the allegations and proof in the case, the plaintiff is entitled to recover, independent of a written contract. *Inter alia*, under the letter of November 21, 1871, taken in connection with the book account of *Brockerhoff*, the plaintiff's case may be sustained as an express trust within the meaning of § 4, act of April 22, 1856, P. L. 533. Trusts need not be created or declared in writing, but only manifested or proved

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in writing: 1 Perry on Trusts, § 79; Barrell v. Joy, 16 Mass. 221; Wetherill v. Seitzinger, 9 W. & S. 177; Raybold v. Raybold, 20 Pa. 308; 1 Perry on Trusts, § 82; Hollinshead v. Allen, 17 Pa. 284.

4. Under the proofs in the case, the claim of the plaintiff may be sustained as a trust or confidence within the proviso to § 4, act of April 22, 1856, P. L. 533. Resulting trusts are trusts that the court presumes to arise out of the transaction; a constructive trust is one that arises when a person, clothed with some fiduciary capacity, by fraud or otherwise gains some advantage to himself: equity not only watches over the defined relations of the parties, in such case, but it scrutinizes the undefined relations of friendly habits of intercourse, personal reliance, and confidential advice: 1 Perry on Trusts, §§ 26, 27, 166, 210; Seichrist's App., 66 Pa. 241; Miller v. Pearce, 6 W. & S. 101; Darlington's App., 86 Pa. 512; Morey v. Herrick, 18 Pa. 128; Boynton v. Housler, 73 Pa. 458.

5. Of course, unless there is in the transaction more than is implied from the mere breach of a parol agreement, equity will not decree a purchaser to be a trustee. And Barnet v. Dougherty, 32 Pa. 371, and all the cases relied upon by the defendants upon this point, are cases of the violation of a mere naked promise. But, it is not essential to the admission of parol evidence, that a fraud was originally intended; it is enough that, though the parties acted in mutual good faith at the inception of the transaction, an attempt is made to wrest the instrument to a purpose not contemplated, or to use it in violation of the agreement. It is as much a fraud to obtain a paper for one purpose, and use it for a different and unfair purpose, as to practice falsehood in its procurement: Rearich v. Swinehart, 11 Pa. 240; Stafford v. Wheeler, 93 Pa. 462; Church v. Ruland, 64 Pa. 433; Parke v. Chadwick, 8 W. & S. 98; Lingenfelter v. Ritchey, 58 Pa. 488; Lippincott v. Whitman, 83 Pa. 246.

6. Under the proofs in this case, the claim of the appellee may also be sustained as a parol mortgage. In every case in which it is made to appear that a deed was intended by the parties as a security for the payment of money, there is necessarily an implied agreement to execute a written defeasance whenever required; and to insist that what was really a mort-

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gage was a sale, is in equity a fraud, which cannot be successfully practiced under the shelter of written papers, however precise and complete they may appear to be: *Maffitt v. Rynd*, 69 Pa. 387. The rule does not impinge on the statute of frauds: it is necessary to hold the law so, to prevent frauds: *Sweetzer's App.*, 71 Pa. 273; *Kunkle v. Wolfersberger*, 6 W. 130; *Hiewter v. Maderia*, 3 W. & S. 384; *Rhines v. Baird*, 41 Pa. 256.

OPINION, MR. JUSTICE MCCOLLUM:

The numerous specifications of error filed in this case raise but few questions. It was alleged in the plaintiff's bill that the agreement under which he claimed was in writing, and lost; and he gave some evidence tending to prove this allegation, but not enough, in the opinion of the learned master, to sustain it. There was, however, a full hearing of the cause before the master, and evidence was taken by him to show an agreement in parol like that which was set out in the bill as written, the occupation, use and improvement of the property by the plaintiff after the sheriff's sale, and all matters germane to the issues formed by the pleadings. After the litigants had exhausted their proofs on these subjects, the master refused to pass upon the questions of fact raised by them, on the ground that the plaintiff, having failed to establish a written agreement, was not entitled to the relief sought. Upon exceptions filed to the master's report, the learned judge of the court below thoroughly examined and carefully considered the testimony, and from it found the facts on which the decree before us was entered.

It is contended, first, that the court erred in not recommitting the case to the master to find the facts.

We are not aware that the power of a court of equity to find the facts in a case before it, upon the testimony reported by an examiner or a master, has ever been denied. It is a power, however, which is seldom exercised; and this court has often said, in substance, that where an equity case depends on oral testimony, it should be referred to a master to report the facts. But the province of a master is merely ancillary, and his work is simply in aid of the court in the performance of its own functions: *Phillips's App.*, 68 Pa. 130. The present cause came on to be heard, on exceptions to the master's report, more

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than two years after the testimony was closed before him. If it had been recommitted to him, he could have derived but slight, if any, assistance from his recollection of the appearance and manner of the witnesses under examination, and would have been compelled, like the court, to depend on the testimony as reported by him. We are not willing to say, under the circumstances of this case, that the court should have sent it to the master again, but if the omission to do so be regarded as a mistake in practice, it was cured "by the full statement of facts and findings by the learned judge in his opinion preceding the decree now appealed from:" Herdic's App., 58 Pa. 212.

It is not our purpose to incorporate in this opinion any portion of the testimony on which the facts were found by the court below. We have read and considered it with care, and we think it abundantly sustains the findings. Indeed, we cannot see how, upon the substantive questions in the cause, different conclusions of fact could have been reached from it. A clear and full statement of the testimony relating to the agreement will be found in the opinion of the learned judge, in connection with the finding upon that question. It discloses an agreement made before and existing at the time of the sheriff's sale, followed by a course of dealing between the parties consistent with it and impossible to reconcile with an absolute transfer of title. A direct conveyance of the property by the plaintiff, under such an agreement, would have constituted a mortgage. A deed absolute on its face may be converted into a mortgage by its attendant circumstances, and in the absence of express proof of a defeasance: *Rhines v. Baird*, 41 Pa. 256. In the case cited, Mr. Justice STRONG said: "Facts and circumstances inconsistent with its being an absolute conveyance may be proved, and from them a court of equity may, and often does, infer that security for a debt was intended, and hence will decree that that which was in form a deed is in reality a mortgage."

May an arrangement which, if consummated directly by the parties, would have constituted a mortgage, retain that character, between the parties to it, if a sheriff's sale is invoked by them to carry it out? For myself, I see no substantial ground for a distinction. In either case, the defeasance can affect only

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the parties to it and those who have notice of it. The deed in either case, apparently, and as respects innocent parties, conveys an absolute title. Why should we hold the grantor to his agreement in one case, and absolve him from it in the other? The circumstance that the parties resorted to legal process in furtherance of their arrangement, should not be allowed to defeat it, or used to enable one party to perpetrate a fraud upon the other. It was held by this court in *Harrison v. Soles*, 6 Pa. 393, that a parol agreement between a judgment creditor and defendant that the creditor should become the purchaser at sheriff's sale of the land of the debtor, and hold the same as collateral security for his debt, giving the debtor the right to redeem, was valid, and could be enforced. In that case the land was purchased by the creditor, who took possession of it, and afterwards attempted to collect the portion of his judgment which was not paid by the sheriff's sale; and he was required to account for the rents and profits according to the terms of the parol agreement. It was decided that he was a mortgagee in possession, and bound to apply the rents of the property to the debt for which it was pledged. It is worthy of note that the opinion of the court in *Harrison v. Soles* was delivered by Mr. Justice ROGERS, from whose opinion in *Jackman v. Ringland*, 4 W. & S. 149, the appellants quote in support of their contention in this case. In *Sweetzer's App.*, 71 Pa. 264, a sheriff's deed was converted into a mortgage by a parol agreement which allowed the debtor to redeem the property. The authority of this case has not been impaired by subsequent decisions. It was recognized in *Heath's App.*, 100 Pa. 1, in which the present Chief Justice, in delivering the opinion of the court, said: "We think the facts as set forth in the bill bring the case within the principle of *Sweetzer's Appeal*, ... where a sheriff's deed was held to be a mortgage, and the grantee named therein a trustee for the man whose land he had bought at sheriff's sale." In *Sweetzer's Appeal* full effect was given to the agreement of the parties in pursuance of which the property was sold by the sheriff, and it was determined that the sheriff's deed was subject to the defeasance agreed upon. In *Logue's App.*, 104 Pa. 136, a sheriff's deed was converted into a mortgage by proof of a parol agreement that it was made as security for a debt or loan; and in the case of *Saunders v. Gould*, 134 Pa. 445, this principle was distinctly recognized.

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FOX v. HEFFNER, 1 W. & S. 372, and **JACKMAN v. RINGLAND**, *supra*, are cited in support of the broad proposition that a sheriff's deed cannot, under any agreement or circumstances, be converted into a mortgage. These were actions of ejectment. In the former case, in disposing of the claim that the transaction was a mortgage, Mr. Justice **SERGEANT** said: "There seems to be nothing in the evidence to justify this view of the case." In the latter, the question was raised upon an offer to prove a naked parol agreement. There was no evidence or offer to show, in either case, that anything had been done on the faith of the agreement; that the purchaser had acquired, or the debtor had lost, anything in consequence of it. In **KIMMEL v. SMITH**, 117 Pa. 183, which was also an action of ejectment, our Brother **GREEN** said: "The second assignment must be sustained, because the transaction in question was in no point of view a mortgage, and in fact it was presented in the general charge as a sale exclusively, and not as a mortgage; and to say it was both, upon the same facts, was necessarily confusing and misleading to the jury. The plaintiff could only recover on the theory that Lawrence Kimmel was a trustee *ex maleficio* for the plaintiff, because of fraud in the making of the parol agreement to convey the land to the plaintiff. Upon that theory the case was tried, and there was none other upon which it could have been tried." He said, further, that there was "the most profound uncertainty as to the essential features of any agreement." It was to such a case that he applied the language of Mr. Justice **SERGEANT** in **FOX v. HEFFNER**, and of Mr. Justice **ROGERS** in **JACKMAN v. RINGLAND**.

In the present case, the parties to the agreement were debtor and creditor, between whom business and friendly relations had existed for a long time, and the affairs of the former were well known to the latter. The agreement involved advances by the creditor to pay the costs of sale and the **Crissman & Sons** judgment, and these he charged upon his ledger to the debtor. Under this agreement, he bid off at the sheriff's sale lands of the debtor worth at least \$12,000 for the nominal sum of \$635. The debtor continued in the actual and exclusive possession of tracts Nos. 1 and 2 without payment or demand of rent; he made valuable improvements on them at his own expense, and the sales of land and timber covered by the sheriff's deed were made on

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consultation with, and at prices agreed to by him. Upon the faith of the parol agreement, at the request and for the benefit of the creditor, he paid \$1,500 of purchase money due on one of the tracts, and conveyed land, not included in the sheriff's deed, worth \$1,300. The creditor distinctly recognized this agreement in his letter of November 21, 1871, and, by acts, declarations, and a course of dealing which would make repudiation of it now a fraud, confirmed it. It should be remembered to his credit that this recognition and acknowledgment of the agreement made with his friend and debtor continued until his death. These are a few of the facts with which this case bristles, and which, we think, bring it within the principle of Sweetzer's Appeal, and distinguish it from the cases relied on by the defendants to defeat this action.

The defendants are not bona fide purchasers for value of the lands in controversy. Their claim to be such rests on the deeds of February 20 and 21, 1878, but these lands are not described in them; and it would appear from the testimony of Andrew Brockerhoff, one of the defendants, when called by the plaintiff on cross-examination, that it was not intended to include them. He said: "I advised my father to make the deed on account of his old age, and directed the making of the deeds, descriptions and all. I directed my father to leave out the lands in Elk county, and these lands in controversy." In view of this testimony, it is probable that the use of language in the deed of February 20th broad enough to include these lands was a mistake, and the attempt of the defendants to build a defence upon it is surprising. But, aside from this, there is nothing in the transaction represented by these deeds which secures to the defendants any better standing to contest the plaintiff's claim than the party to whose rights they have succeeded.

There is no evidence in the case which stamps the arrangement under which the sheriff's sale was made as a fraud upon creditors; and, certainly, we are not to presume fraud in favor of parties who allege it, that they may retain the fruits, and escape the obligations, of a contract their father made.

The bill alleges that the agreement was written; the proof is that it was verbal. Is the variance fatal? We think not.

A parol defeasance, sufficiently proven, is the equivalent of a written one. The vital question is, not whether the agree-

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ment was reduced to writing, but whether it was made. In Danzeisen's App., 73 Pa. 65, the bill charged that the defendant held the property in trust for the plaintiff, and it was dismissed at nisi prius on the ground that a trust was not shown; but, on appeal to this court, it was sustained as a bill to redeem a mortgage. The case at bar was fully heard upon its merits; the variance is technical, rather than substantial, and, if necessary to reach the justice of the case, an amendment would be allowed at any stage of the proceeding. We regard the transaction respecting the lands in question as a mortgage of them for the purpose stated in the ninth finding of facts by the court below. It was always so understood and recognized by the parties to it, and the effort of the heirs and legal representatives of the mortgagee to stamp it as a sale cannot be sanctioned. In this view of the case, the statute of frauds has no application, and there is no limitation or laches which prevents a recovery. The learned judge of the court below stated an account between the parties which we think is fairly sustained by the evidence. All the items of claim on both sides, and the proofs to support them, were before him. He was not asked to refer the case to a master to state an account, and it is not alleged that there is other evidence affecting these claims. The parties have had a full and fair hearing upon all the questions raised, and a just conclusion has been reached.

Decree affirmed and appeal dismissed, at the cost of the appellants.

136	200
158	68

ANNA LANCE v. EDWARD GORMAN ET AL.

APPEAL BY DEFENDANTS FROM THE COURT OF COMMON PLEAS
OF SCHUYLKILL COUNTY.

Argued February 19, 1890—Decided October 6, 1890.

Re-argument refused November 10, 1890.

[To be reported.]

1. Though a judgment creditor is not a purchaser within the recording acts, a purchaser of land under his judgment has all the qualities of

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one, by relation, from the date of the lien, and his title is paramount to all conveyances and encumbrances subsequent thereto: *Woods v. Farmer*, 7 W. 382.

2. Wherefore, it is incumbent on one who alleges a resulting trust in his favor, antedating the entry of the judgment under which the sheriff has sold the legal title to land, to show that the purchaser at the sheriff's sale had notice, actual or constructive, of the equitable title or resulting trust, at the time he bought.
3. The possession of property, in person or by tenants, is notice of title in every form; but, when one who is in possession has placed on record a particular title, consistent with that possession, the registry thereof will restrict the generality of notice from possession, narrowing it to specific notice of that particular title.*
- (a) Land paid for with money of a wife, was conveyed by mistake to her husband. After the entry of judgments against him, the husband and wife conveyed it to a third person, who then conveyed to the wife. These conveyances were dated and recorded the same day, and purported to be made for "\$100 and divers other good considerations."
- (b) At a sheriff's sale of the land as the property of the husband, subsequently held under the judgments aforesaid, the wife gave written notice to bidders that the land was her sole and separate property, and that the sale would not pass title. Her tenants were in possession at and before the date of the sale:
4. The written notice being silent as to the fact that the wife's title antedated the judgments, and both that notice and the possession of the wife's tenants being consistent with and referable to the recorded deed to the wife, neither of them was sufficient to put purchasers on inquiry as to a prior equitable title.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS and MITCHELL, JJ.

No. 54 January Term 1890, Sup. Ct.; court below, No. 194 May Term 1881, C. P.

On April 4, 1881, J. C. Lance and Anna Lance, his wife, in right of said wife, brought ejectment against Edward Gorman and Mary Gorman for a lot of ground in Mahanoy City. The defendants pleaded not guilty.

At the second trial on March 25, 1889, J. C. Lance being then dead, the jury were sworn as to Anna Lance alone, and the following facts were shown:

In 1872 Jacob Newkirk was the owner of the premises in controversy. On October 23, 1872, he conveyed them to J. C.

Statement of Facts.

Lance, the consideration named in the deed being \$7,000. That deed was duly recorded on December 5, 1872. On December 4, 1872, two judgments in favor of C. M. Swayze and against J. C. Lance and J. C. Lance, Jr., for \$579.58 and \$500 respectively, were entered by confession. By deed executed in August, 1874, J. C. Lance and Anna, his wife, conveyed the lot of ground aforesaid to David H. Klingerman for the expressed consideration of "\$100 and divers other good and sufficient considerations them thereunto moving;" and by a deed bearing the same date and expressing the same consideration, Klingerman conveyed the same property to Anna Lance. Each of these deeds was acknowledged August 24, 1874, and placed on record August 31, 1874. Subsequent thereto a judgment for \$632.10 was recovered against J. C. Lance by J. F. Schreiber. Other judgments were recovered against Lance at and about the time of the conveyance to his wife, some prior and some subsequent thereto, but all based upon claims in existence at the date of that conveyance.

On May 27, 1876, by virtue of executions issued upon the three judgments first above mentioned, the sheriff sold said lot of ground to the defendant, Mary Gorman, who afterwards received a sheriff's deed therefor and entered into possession. At said sheriff's sale a notice was read, signed by the attorney of Mrs. Lance, which was as follows :

"To Purchasers and Bidders :

"Take notice, that the following property, taken in execution and advertised to be sold this day, bounded and described as follows : [Here follows a description of the property advertised,] as the property of Joel C. Lance, is not the property of Joel C. Lance as whose property it is advertised to be sold, but is the sole and separate property of Anna Lance, and any person buying the same at this sale will acquire no title; May 27, 1876."

At and prior to the date of the sheriff's sale, the property was in possession of tenants of the plaintiff, Anna Lance.

Testimony for the plaintiff tended to show that in December, 1868, Anna Lance by articles of agreement in her own name, purchased a farm from one Boyer, and that on August 20, 1864, she received a deed from him therefor; that the purchase-money of this farm was paid with funds given to her by her

Charge of Court below.

father ; that, in 1866, the Boyer farm was sold for \$3,600 by Mrs. Lance and her husband, and the purchase-money received for it was invested in the purchase of another farm from Andrew Robertson and one Beddel, the remainder of its price being paid out of the proceeds of crops and timber taken from the land, and a loan for \$1,000 made on the credit of the farm ; that the deed from Beddel and Robertson was to have been made to Mrs. Lance, but by mistake it was made to her husband ; that the correction of the mistake, by the making of a deed to the wife, was talked of after the mistake was discovered, but it was not made ; that the Beddel and Robertson farm was finally traded to Jacob Newkirk for the property in controversy in this suit, and by another mistake the deed from Newkirk above mentioned was made to J. C. Lance instead of to Anna Lance ; and that the conveyance to Klingerman, and his conveyance to Mrs. Lance, were made for the purpose of correcting this mistake and executing the resulting trust under which J. C. Lance had held the title for the use and benefit of his wife. These conveyances, however, contained no reference to any equitable title or prior right in Mrs. Lance.

Portions of the plaintiff's allegations were controverted, and various questions were raised regarding the alleged trust in the husband for the benefit of the wife, and the proof thereof, which it is not necessary to refer to, in view of the ground upon which the decision of the Supreme Court was based.

At the close of the testimony the court, PERSHING, P. J., charged the jury in part as follows :

It is claimed here that this conveyance to Mrs. Lance was simply putting the title in her name, where it rightfully belonged ; that at no time, during the progress of the transactions in evidence before you, did the Boyer farm, or the Beddel farm, or the property in Mahanoy City, lot No. 10, really belong to Joel C. Lance ; that it was the property of his wife, paid for by her means. If you find the facts to be so, then she would be entitled to your verdict. Her deed, you will observe, was put upon record in August, 1874. That was notice to all the world of the title she claimed. The very object in putting a deed upon record is to give notice. The purchase at sheriff's sale was not made until May, 1876.

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The Supreme Court has held that it is the duty of every man, who purchases at sheriff's sale, to examine the record and ascertain how the title stands. The purchaser simply buys the title that is put up for sale. The defendants here bought the title of Joel C. Lance. If he had any title, they took it; if he had no title, they bought nothing. Under the maxim of the law, *caveat emptor*, the purchaser must take notice. Her deed was upon record from August 31, 1874, until May 27, 1876, when the sale took place, open to the inspection of every man who was disposed to purchase, or had any interest in the property. In addition to that, there is evidence here that a notice was read to the public on the day of the sale, warning persons that bidders would take no title by their purchase; that the property did not belong to Joel C. Lance, but belonged to Anna Lance.

A number of points have been submitted, and I will now proceed to answer them.

The defendants have submitted several points:

1. The defendants having shown the title to the premises in controversy in Joel C. Lance, December 4, 1872, the time when C. M. Swayze entered his two judgments against the said Joel C. Lance, executions thereon, a sale by the sheriff thereunder, an acknowledgment and delivery of a deed to Mary Gorman, the defendant, the verdict must be for the defendants, unless the jury find, from the evidence in the cause, that a trust resulted in favor of Anna Lance, the plaintiff, by reason of payment of the purchase money.

Answer: This we affirm.

2. In order to sustain effectually a resulting trust arising from the alleged payment of the purchase money with which an estate was bought, and to overthrow the legal title, fortified by all the solemnities which attend formal conveyances under seal, it is necessary that the proof should be full, clear and convincing. The evidence must go distinctly to the fact of payment. Slight and equivocal facts which raise mere suspicions and doubts are altogether inadequate. A man is not to be dislodged from the security in which he is entrenched by the ordinary muniments of title, and dispossessed of his property, by mere gossip and an aggregation of immaterial and inconclusive facts, none of which prove decisively or satisfactorily the issue which is made against him.

Arguments.

Answer: This is quoting the language of some of the cases, and as a rule of law, we affirm it.

3. If the jury find that there was no resulting trust in favor of Anna Lance, the plaintiff, then by her deed of August 23, 1874, she took title to the land in controversy, subject to the lien of the Swayze judgments, and her title was divested by the sheriff's sale under the Swayze judgments, and the verdict must be for the defendants.

Answer: We affirm that, if you find the facts to be as stated.

8. Under all the evidence in the case, the verdict must be for the defendants.

Answer: We decline to so instruct you; we negative that.¹³

Gentlemen, we submit this important case to you and hope you will give it the consideration which it merits. We have already instructed you, if you find this was the property of Joel C. Lance, then your verdict should be for the defendants. Was Joel C. Lance interested in the property? If you are satisfied that it is the property of Anna Lance under all the evidence in the case, that during the time he held the deed for it, he held it simply as a trustee for her, that it was her money that was invested in the property during all that time, then, the defendants here not having bought any interest of Anna Lance, your verdict would necessarily be in her favor.

The verdict of the jury was in favor of the plaintiff for the land in dispute. A rule for a new trial having been discharged, judgment was entered on the verdict; whereupon the defendants took this appeal, assigning for error, *inter alia*:

13. The refusal of defendants' point.¹³

Mr. F. W. Bechtel and *Mr. John G. Johnson* (with them *Mr. James B. Reilly*), for the appellants:

1. The purchaser at the sheriff's sale had no notice of the alleged equitable title of Mrs. Lance. The deeds to and from Klingerman contained no reference to it, and therefore Mary Gorman had no constructive notice thereof. The notice read at the sale did not mention it, and Mary Gorman, therefore, had no actual notice. On the face of the deed to Mrs. Lance, it was merely the acquisition of the title of J. C. Lance, after the lien of the Swayze judgments had attached to it.

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2. The notice at the sale contained nothing new as to her title, was in accordance with the deed and was clearly referable to it. It had no tendency to lead to the inquiry whether she had a title prior to the deed. Mrs. Gorman was therefore a purchaser without notice of the equitable title set up at the trial, and the plaintiff was not entitled to recover: *McCandless v. Blakely*, 12 W. N. 510; *Dickinson v. Beyer*, 87 Pa. 274; *Woods v. Farmere*, 7 W. 384; *Leach v. Ansbacher*, 55 Pa. 89; *Fillman v. Divers*, 31 Pa. 429; *Scott v. Gallagher*, 14 S. & R. 333.

Mr. James Ryon and Mr. John W. Ryon, for the appellee :

1. Whatever facts put a party upon inquiry, amount in law to notice, provided inquiry becomes a duty, as in the case of purchasers and creditors, and it would lead to knowledge of the requisite facts by the exercise of ordinary diligence and understanding: *Jaques v. Weeks*, 7 W. 261; *Maul v. Rider*, 59 Pa. 167. The notice, given at the sheriff's sale, that J. C. Lance had no title, and that the sale would not vest title in the purchaser, was sufficient to warn Mrs. Gorman, and require her to make inquiry of Mrs. Lance as to the grounds upon which she claimed the title.

2. Moreover, at the time of the sale, the property was occupied by tenants of Mrs. Lance. Their possession was notice of their landlord's title: *Hottenstein v. Lerch*, 104 Pa. 454. The defendants claim under a sheriff's sale upon judgments against J. C. Lance. A judgment creditor is not entitled to the protection of a purchaser against the equitable owner: *Cover v. Black*, 1 Pa. 493; *Rodgers v. Gibson*, 4 Y. 111; *Ludwig v. Highley*, 5 Pa. 132; *Reed's App.*, 18 Pa. 476; *Morris v. Ziegler*, 71 Pa. 450.

OPINION, MR. JUSTICE STERRETT:

This action of ejectment was brought by plaintiff and her husband, since deceased, to recover possession of the lot in controversy, in her own right. Both parties claimed under Jacob Newkirk, who by deed dated October 28, 1872, duly recorded, conveyed the lot to plaintiff's husband, Joel C. Lance, for the consideration of \$7,000. In 1874, Lance and wife by deed acknowledged and recorded in August of that year, "for

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and in consideration of \$100 and divers other good and sufficient considerations them thereto specially moving," conveyed the same to David H. Klingerman, who, with his wife, thereupon, for the same consideration, by deed acknowledged and recorded on the same day, conveyed the same property to Anna Lance, the plaintiff. Her contention was that the consideration paid to Newkirk was money of her separate estate; that her husband was merely trustee for her of the legal title, and that the conveyance to Klingerman and by him to her was solely for the purpose of uniting in her the legal with the equitable title. In support of that position, evidence was introduced to show that in 1864, and subsequently, money of her separate estate, received from her father, was invested in the Boyer farm, and the deed therefor taken in her name; that about two years thereafter it was sold for \$3,600, a portion of which at least was paid to her and afterwards invested in the Robertson and Beddel farm, which in turn was sold and with part of the proceeds the lot in controversy was acquired. The evidence as to these investments, re-investments etc. is quite voluminous; but, without referring thereto in detail, it is sufficient to say that it tended to sustain plaintiff's contention, and having been submitted to the jury under proper instructions, the result was a verdict in her favor. The only inference that can be drawn from the verdict is that the jury found plaintiff's allegations of fact were true, viz., that the money of her separate estate, which had been several times invested and re-invested in real estate, was finally used in acquiring title to the lot in controversy from Jacob Newkirk in October, 1872, and that none of her husband's money or property was employed in making the purchase. Exception was taken to the admission of some of the evidence above referred to, and to instructions of the court in submitting the same to the jury. If it becomes necessary to do so, the specifications of error relating thereto will be considered hereafter.

The contention of the defendant, Mary Gorman, is that in 1876 she became a bona fide purchaser, for value, of the lot in question at sheriff's sale, without notice of any resulting trust in favor of plaintiff. In support of that position, evidence was introduced to prove that the real estate in controversy was levied on and sold on executions based on three judgments

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against Joel C. Lance, two of which judgments in favor of C. M. Swayze, Nos. 28 and 29 of March Term 1873, were entered December 4, 1872, nearly two years before the conveyance of Lance and wife to Klingerman, and by him to Mrs. Lance, the plaintiff; that at said sale Mary Gorman purchased the property in controversy for \$2,810, and the same was duly conveyed to her by the sheriff. Evidence was also introduced tending to prove that about the time of the conveyance of Lance and wife to Klingerman, and by him to Mrs. Lance, in 1874 and prior thereto, Lance was largely indebted and suits had already been brought against him, etc. When the two Swayze judgments, above referred to, were entered, the title to the real estate in controversy appeared by the record to be in Joel C. Lance, the defendant in said judgments. The other judgment in favor of Schrieber was obtained after the conveyance to Mrs. Lance. It follows from what has been said, as to the actual state of the record, etc., that if defendant's purchase at sheriff's sale in 1876 was without notice, actual or constructive, of Mrs. Lance's equitable title, resulting from the use of her money in effecting the purchase from Newkirk, the defendant acquired a good title. The question of notice thus becomes a controlling factor in this case, and the burden of proving it devolved on the plaintiff. In other words, it was incumbent on her to establish two propositions: first, that she had an equitable estate in the property, resulting from the use of her own money in purchasing the same from Newkirk, anterior to the entry of either of the Swayze judgments on which it was afterwards sold as the property of her husband; second, that the purchaser at sheriff's sale had notice of that equitable title or resulting trust when she bought the property: *Fillman v. Divers*, 31 Pa. 429. As already stated, the verdict in plaintiff's favor necessarily implies an affirmative finding of the first proposition; and, assuming, for argument sake, that there was no error leading to that result, was there any evidence to warrant the jury in also finding the second proposition affirmatively? If there was not, the plaintiff failed to make out such a case as entitled her to a verdict, and defendant's eighth point for charge, viz., that "under all the evidence in the case, the verdict must be for the defendants," should have been affirmed.

It is contended that the possession of the premises in dispute

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by plaintiff's tenants, at the time of the sheriff's sale, was constructive notice to the defendant of the terms of their tenure, and also of the title of their lessor; that the defendant, in obedience to the maxim, *caveat emptor*, is presumed to have inquired and informed herself in regard to the condition of the title she was about to purchase. Conceding that inquiry thus became a duty, what would have been disclosed by a reasonable performance of that duty? Defendant would have learned that the parties in possession were plaintiff's lessees, and that plaintiff claimed to own the property. An examination of the records would have disclosed the further fact, that the evidence and only record evidence of her title was the deed of Klingerman and wife recorded August 31, 1874, more than a year and a half after the Swayze judgments, on which the property was about being sold, were entered, and further, that for nearly two years prior to the date of that conveyance the recorded title was in the name of plaintiff's husband, Joel C. Lance. Neither the deed of Klingerman and wife, nor anything in the regular path of inquiry, would have disclosed a trust in plaintiff's favor, resulting from her having furnished out of her own separate estate the consideration of the conveyance to her husband by Jacob Newkirk in 1872. On the contrary, all the inquiry that defendant was reasonably required to make would have resulted in showing that plaintiff's title had its inception in the contemporaneous conveyances of herself and husband to Klingerman, and by the latter to her.

The principles of law applicable to constructive notice, duty of inquiry, etc., are clearly stated in several of our cases, among which are *Plumer v. Robertson*, 6 S. & R. 179, 185; *Woods v. Farmere*, 7 W. 382, 386; *Dickinson v. Beyer*, 87 Pa. 274, 281; *Fillman v. Divers*, *supra*. In the former, it is said: "Where a man is in possession, without making his title known, a prudent person would not purchase without making inquiry into that title; but, where he who is in possession, has placed upon record a title consistent with that possession, it may well be taken for granted that he holds under the recorded title; especially in this commonwealth, where every deed, or writing, affecting the title of lands, may be, and ought to be recorded." In *Woods v. Farmere*, *supra*, it is said that a purchaser of land is not affected with constructive notice of anything which does

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not lie within the course of his title, or is not connected with it; that possession is notice of the possessor's title, but the registry by him of a particular title would restrict the generality of notice from possession. "The tenant's possession is notice of title in every form; the registry of a particular title is notice of that alone, and would be useless for any purpose but to restrict the generality of the notice from possession. It is therefore an indication that the occupant has narrowed his general to specific notice; and, were he not bound by it, he might with impunity do an act to mislead one who is presumed to have used every means of information accessible to him so far as the security of his title is concerned, but no further. . . . Though a judgment creditor be not a purchaser within the recording acts, a purchaser under his judgment has all the qualities of one, by relation, from the date of the lien; and his title, being thus of record and contemporaneous with the judgment, is paramount to all conveyances or encumbrances subsequently attempted:" *Woods v. Farmere*, *supra*.

The notice, "To Purchasers and Bidders," read at the sheriff's sale, that the property therein described "is not the property of Joel C. Lance, as whose property it is advertised to be sold, but is the sole and separate property of Anna Lance, and any person buying the same at this sale will acquire no title," is silent as to the fact, now relied on by the plaintiff, that her equitable title antedated the Swayze judgments on which the property was sold. That fact is not even suggested in the written notice, and, in the absence of anything tending to convey such information, the assertion in the notice that the property offered for sale "is the sole and separate property of Anna Lance," is referable alone to the deed of David H. Klingerman and wife to her, executed after the Swayze judgments were entered against her husband. As notice of the anterior resulting trust and equitable title in Mrs. Lance, the paper read at the sheriff's sale was no more effective than the constructive notice arising from the possession of her tenants at the time of the sheriff's sale. They were both sufficient to put purchasers on inquiry; but, in either case, that inquiry would not necessarily lead to anything more than a knowledge of the Klingerman deed which she had put upon record as the origin of her title.

Syllabus.

There appears to be nothing in the evidence to warrant the jury in finding that Mrs. Gorman purchased with either actual or constructive notice of a resulting trust in favor of Mrs. Lance, or that the latter had any interest whatever in the property in controversy, prior to the conveyance of Klingerman and wife in 1874. We are therefore of opinion that defendants' eighth point for charge should have been affirmed, and the jury thereby instructed "that under all the evidence in the case the verdict must be for the defendants."

This view of the case renders a consideration of other questions, presented by the specifications of error, unnecessary.

Judgment reversed.

ESTATE OF DAVID LIGHT, DECEASED.

APPEALS BY DAVID LIGHT, JR., FROM THE ORPHANS' COURT
OF LEBANON COUNTY.

Argued February 19, 1890—Decided October 6, 1890.

[To be reported.]

1. It is a well settled rule that when the statute of limitations begins to run against a debt, it will not stop because of the death of either party; and, since the decision of Yorks' App., 110 Pa. 69, this is a rule of general application.
2. When an attempt is made, in the distribution of a decedent's estate in the Orphans' Court, to set off against a legacy a debt from the legatee to the testator, the legatee may plead the statute of limitations, notwithstanding that the debt was not barred at the testator's death.
3. The reasoning of Thompson's App., 42 Pa. 345, as respects the statute of limitations, is at best obiter dictum, as the cases on which it is based do not support it, McClintock's App., 29 Pa. 360, being overruled in Yorks' App., 110 Pa. 69, and Courtenay v. Williams, 3 Hare 539, is not in accord with the current of our decisions.
4. While an adjudication, allowing a claim in a distribution in the Orphans' Court, will toll the bar of the statute of limitations: Reber's App., 125 Pa. 20; the allowance of a dividend upon a debt by a decree of the Court of Common Pleas, distributing funds of an assigned estate, will not have that effect.
5. The payment of part of a debt, by an assignee for creditors of the debtor, will not keep the debt alive by implying a new promise of the

136	911
136	239
136	211
167	599
136	211
180	60
136	211
181	614

136	211
1207	230

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assignor to pay it, because the assignee is not the agent of the assignor for that purpose, and his powers are limited by the scope of his official duties.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS and MITCHELL, JJ.

Nos. 162, 163 January Term 1890, Sup. Ct.; court below, No. 5 March Term 1889, C. P.

To the number and term in the court below David Light, Jr., administrator d. b. n., c. t. a., of David Light, deceased, settled an account exhibiting a balance in his hands of \$8,485.15. The account having been confirmed, the court appointed *Mr. J. G. Adams* auditor to make distribution of said balance among the persons legally entitled thereto. The auditor afterwards reported, finding in substance the following facts:

David Light, the decedent, died on February 26, 1873, leaving a will by which he directed that at the death of his wife his real and personal property should be sold and the proceeds thereof should be equally divided among all his children; further providing as follows: "And what I have given to any of my children in my lifetime, and charged the same in my book, shall be charged and deducted from their several and respective shares in the distribution of my estate."

Said will was duly admitted to probate on May 26, 1873, and letters testamentary thereon issued to two of the testator's sons, Levi and Israel Light, who were named therein as executors. In 1878 they were discharged on account of insolvency, and the accountant, who was also a son of the decedent, was appointed administrator, etc., in their stead.

At the time of his death the testator held the following notes against his son Levi:

Note dated August 8, 1867, at one day, \$83.61.

Note dated April 15, 1868, at one day, \$200.

Note dated April 1, 1870, at one year, \$110.

He was also surety for Levi upon two notes; one dated December 3, 1870, at three months, for \$300, in favor of Moses Light; and the other dated April 12, 1871, at one day, for \$250, in favor of Catharine Hunsicker. After his death, judgments were confessed by his executors to the holders of the two notes last mentioned, for the amounts due thereon respectively, which

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judgments were paid out of his estate, and satisfied upon the record April 24, 1880. Levi became insolvent and made an assignment for the benefit of creditors sometime in 1876. On the distribution of his assigned estate among his creditors, the notes above mentioned were presented as claims, and on March 28, 1881, the Court of Common Pleas confirmed the report of an auditor awarding dividends thereon.

Israel Light, another son of the testator, was indebted to him, at the time of his death, upon a note dated April 8, 1870, at 60 days, for \$360, and the testator was also surety for Israel upon a note dated April 1, 1862, at one year, for \$300, in favor of David Rauch. The testator's executors confessed judgment in 1878 to the holder of the latter note, for the balance due upon it, and on April 24, 1880, that judgment, having been paid out of his estate, was satisfied of record.

The interest of Levi Light in his father's estate was sold by his assignee for creditors to George Hoffman. Israel Light assigned his interest in said estate to George Hoffman, the First N. Bank and the Lebanon Trust and Safe Dep. Bank. These transferees appeared and asked the auditor to award the distributive shares of Levi and Israel to them as the assignees thereof.

The accountant put in evidence the notes and judgments above mentioned, and asked the auditor to charge against the respective shares of Levi and Israel the respective sums due upon notes in favor of the testator, and for payments made out of his estate, as aforesaid. The assignees of the shares thereupon pleaded the statute of limitations to the claims so proposed to be set off. The auditor did not report any finding or evidence that any indebtedness was charged by the testator, in his "book," against Levi and Israel, or either of them.

Upon the facts above stated, the auditor reported his opinion in part as follows:

The only legal question, therefore, that was presented for the determination of the auditor, was whether the notes held against Israel Light and Levi Light were barred by the statute of limitations. Upon a careful examination, your auditor came to the conclusion that the statute does not apply and the notes in question are not barred, and that Levi Light and

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Israel Light cannot participate in the distribution of the estate, unless their respective distributive shares should be greater than their respective debts due the estate.

These claims were all valid claims at the time of the death of the testator; but, it was contended by Mr. Killinger, who represented the assignees of the distributive shares of Levi Light and Israel Light, that the statute ran before the distribution of the estate, and therefore these debts cannot be set off against their respective shares. This question is directly decided in Thompson's App., 42 Pa. 345, that they can be set off, and that the executors can claim the legacy in whole or in part in satisfaction of the indebtedness.

Your auditor was in doubt whether the authority of Thompson's Appeal was not shaken by later decisions. Milne's App., 99 Pa. 483, cited by Mr. Killinger, decides that the debt of a distributee which was barred at the time of the death of the decedent cannot be set off as against such distributee's share in the estate. This is all that Milne's Appeal decides. It does not change the law as laid down in Thompson's Appeal, that a debt valid at the time of the death of the testator can be set off by the executor, in satisfaction of the indebtedness of the legatee.

Yorks' App., 110 Pa. 69, also cited by Mr. Killinger, is at present regarded as the controlling case on the question of the statute of limitations, as it overruled a number of cases which decided that the statute of limitations does not apply in the Orphans' Court. Upon an examination of Yorks' Appeal, we find that it deals exclusively with cases where the relation of debtor and creditor existed, and that it does not apply to cases pertaining to the distribution of decedent's estates among legatees, or next of kin, nor where the parties are in relation to each other as executors and legatees. Justice PAXSON, in his opinion on page 80, says: "I throw out of view the question of the character of the trust between the executor and next of kin and legatees. That question is not before us and will not be considered further than to remark that in those instances there is a trust pure and simple. No relation of debtor and creditor exists, or can exist in such cases." By this remark it would seem that those cases, where the relation of executor and next of kin or legatee existed, were not intended

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to be affected by the ruling in Yorks' Appeal, and therefore the ruling in Thompson's Appeal stands unchanged and unaffected.

The indebtedness of Israel Light to the estate is found to be \$1,688.39, and the indebtedness of Levi Light to the estate is found to be \$1,676.08, which amounts are greater than their respective distributive shares would be.

—The auditor accordingly excluded the transferees of the distributive shares of Levi and Israel Light from the distribution reported by him.

To the report of the auditor, George Hoffman, et al., as assignees of the shares, excepted. After argument of the exceptions, the court, MCPHERSON, J., filed an opinion holding that the language of the decision in Thompson's App., 42 Pa. 345, relied on by the auditor, was a dictum which ceased to be of authority after the decisions in Reed v. Marshall, 90 Pa. 349; Milne's App., 99 Pa. 490, and Yorks' App., 110 Pa. 77; that the statute of limitations was a good reply to the notes in favor of the testator, because the right of action arose in his lifetime, and the running of the statute was not suspended by his death; that, even if the fact that Levi was one of his father's executors, suspended the running of the statute as to the notes upon which he was liable, such suspension ceased upon his removal from said office in 1878; that it was unnecessary to decide whether the payment of dividends upon such notes, by Levi's assignee for creditors, would toll the statute, inasmuch as such payments were made more than eight years prior to the audit; and that, as to the payments made out of the estate of the testator upon the notes upon which he was surety, the right of action accrued, not to the testator but to his estate, either in 1878 or 1880: Wesley Church v. Moore, 10 Pa. 273; Ardesco Oil Co. v. Oil & M. Co., 66 Pa. 375; Smith v. Harry, 91 Pa. 119; Ward's App., 100 Pa. 289; Wood on Limitations, § 145; and the statute began to run at one or other of those dates, and had closed down upon the claims arising out of such payments. The auditor's report was thereupon recommitted, for a distribution in accordance with the opinion.

The auditor subsequently reported an amended distribution in which the shares of Levi and Israel were awarded to the assignees thereof, without any deduction on account of the

Arguments.

notes and demands above mentioned, and subsequently the court, MCPHERSON, J., confirmed the amended report and decreed distribution in accordance therewith. Thereupon David Light, Jr., took these appeals, one relating to the distributive share of Levi, and the other to that of Israel, specifying that the court erred:

1. In not confirming the first report of the auditor.
2. In confirming the auditor's amended report.
5. In deciding that the notes and claims, held by the estate against Levi and Israel, were not advancements to be deducted from their legacies under the will.
6. In deciding that said notes and claims could not be set off against the legacies, because barred by the statute of limitations.

Mr. John Benson, for the appellant:

1. Were the notes given to the testator by his sons, which were not barred at the time of his death, subject to the bar of the statute of limitations at the time of the distribution? In the cases cited by the court below, either the statute had fully run before the death of the decedent, or else the controversies arose upon suits in the Common Pleas. None of them were like this case. It is now the law of Pennsylvania that when a debt due from a legatee to the testator matured more than six years before his death, it is barred, and the statute can be taken advantage of in the Orphans' Court; but, when the debt was not barred at the testator's death, a different rule prevails, and the debt can be applied to the payment of the legacy in part or in whole: *Yorks' App.*, 110 Pa. 80. The date of the death fixes the rights of the debtor and of the legatee, who has in his hands assets of the estate sufficient to pay a part of his legacy: *Thompson's App.*, 42 Pa. 357; *Agnew v. Fetterman*, 4 Pa. 56; *Reed v. Marshall*, 90 Pa. 349.

2. Is the demand for money, paid upon notes in which the testator was surety, barred? This is governed by the same principles as the question already discussed. It is true the right of action accrued only after the testator's death, but the debt was created and existed before. The legacy vested on the testator's death, and equity will apply the money so paid, as having been paid on account of the legacy, and will deduct it

Arguments.

therefrom. Moreover, as to the claims against Levi, the bar of the statute, if it applied thereto, was tolled by the distribution made in his assigned estate. That distribution was an adjudication of those claims: *Reber's App.*, 125 Pa. 20. It was a decree of a court of competent jurisdiction, equivalent to a judgment recovered upon suit brought, and has the same effect as if recovered in an action at law upon those claims.

Mr. C. H. Killinger and *Mr. J. P. S. Gobin*, for the appellees:

1. This case cannot be distinguished from *Yorks' App.*, 110 Pa. 69, as falling within the exception of a "trust pure and simple," therein referred to. To bring a case within that exception, the trust must exist as to the subject matter of the action: *Thompson v. McGaw*, 2 W. 161; *App v. Dreisbach*, 2 R. 287; *Bell's Est.*, 25 Pa. 92. The relation between the legatee and the estate in this case, is that of debtor and creditor, and there is no trust involved in the determination of the controversy. The statute could have been pleaded in a common-law suit on these notes, and by reserving them for use as a set-off, the administrator cannot deprive the debtor of his right to plead it; for, when the jurisdiction is concurrent, the rule must be the same in either forum: *Yorks' App.*, 110 Pa. 69; *Keyser's App.*, 124 Pa. 80; *Gilmore v. Reed*, 76 Pa. 462. Besides, this case is ruled, in principle, by the two cases cited by the court below, *Reed v. Marshall*, 90 Pa. 345; *Milne's App.*, 99 Pa. 483. The notes were overdue, and the statute had begun to run when the testator died. His death did not stay it: *Amole's App.*, 115 Pa. 356.

2. As to the notes upon which the decedent was surety, certain additional considerations apply. The administrator was guilty of a devastavit in applying funds of the estate to the payment of those notes, which were barred as against the estate when he paid them. He could neither re-assume the barred liability for the estate: *Reber's App.*, 125 Pa. 20; nor could he bind the estate by recognizing them as subsisting claims: *Hoch's App.*, 21 Pa. 280. Had suit been brought against the estate, the appellees could have pleaded the statute, although the administrator did not: See cases cited in *Yorks' App.*, supra. When brought into this distribution, they are open to

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the same objections from us, as this is the first opportunity we have had to plead the statute. While the allowance of a claim in an Orphans' Court distribution will toll the bar of the statute: *Reber's App.*, 125 Pa. 20; the rule is otherwise as to a distribution in the Common Pleas of an assigned estate: *Burrill on Assignments*, § 446; *Roosevelt v. Mark*, 6 Johns. Ch. 266; *Pickett v. Leonard*, 34 N. Y. 175; *Pickett v. King*, 34 Barb. 193; *Marenthal v. Moster*, 16 Ohio 566; *Stoddard v. Doane*, 7 Gray 387; *Bunn v. Drovin*, 2 Phila. 306. But more than six years have elapsed since the dividend out of the assigned estate of Levi was paid.

NO. 162.

OPINION, MR. JUSTICE CLARK:

David Light died February 26, 1873, leaving to survive him a widow and seven children. By his last will and testament, he directed that after the death of his widow all his real and personal property should be sold, and that the proceeds thereof, with the money on hand, should be equally divided amongst his children. After the widow's death, this provision of his will was complied with, and the account of the administrator, d. b. n., c. t. a., shows a balance in his hands of \$8,485.15, and this is the fund for distribution. By his will, the decedent provided as follows: "And what I have given to any of my children in my lifetime, and charged the same in my book, shall be deducted from their several and respective shares in the distribution of my estate."

The testator held three notes against his oldest son, Levi Light: one dated August 8, 1867, payable one day after date, for \$83.61; one dated April 15, 1868, payable one day after date, for \$200; and one dated April 1, 1870, payable one year after date, for \$110. The testator was bail for Levi on two other promissory notes: one to Moses Light, dated December 3, 1870, payable three months after date, for \$300; the other to Catherine Hunsicker, dated April 12, 1871, payable in one year, for \$250. The interest on these two notes was paid by Levi up to the year 1876. In that year, Levi Light became insolvent, and the assignee for creditors, in the course of the settlement of his trust, sold and transferred the interest of Levi in his father's estate to George Hoffman et al., the appellees. The

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estate of David Light, the testator, having been obliged to pay the notes upon which David Light was bail, the whole five notes were presented in the distribution of the assigned estate in 1881, and were allowed a dividend.

The testator, at the time of his death, held a promissory note dated April 8, 1870, payable in sixty days, for \$360, against his son Israel, who also assigned his interest in his father's estate to George Hoffman et al., the appellees.

At the distribution of the fund of \$8,485.15, in the hands of the administrator of David Light, deceased, all the notes mentioned, not only those of Levi Light, but also the note of Israel Light, were laid before the auditor by the appellants as a set-off against the legacies of Levi and Israel respectively, or as charges, in the nature of advancements, upon their respective shares in the estate. The appellees resisted this, upon the ground that there was no evidence whatever that the sum specified in any of the notes was ever intended or treated as an advancement, and that, as a set-off, the notes were all barred by the statute of limitations.

The notes were not barred at the death of David Light, deceased, and it is argued, upon the authority of *Thompson's App.*, 42 Pa. 345, that: "When a legatee comes into the Orphans' Court, which is a court of equity, to demand his legacy, he is obliged to do equity by applying his debt in payment of it;" that, so long as the debt remains undischarged, the assignees, in right of the legatee, will not be entitled to receive the legacy. *Thompson's App.*, *supra*, was, without doubt, rightly decided on other grounds. The testator, in that case, by his last will declared his intention to advance to each of his daughters a sum on her marriage, to be deducted from her share, and did so charge each daughter on his family book with the sums advanced, as also his son with the amount of the note in question, paid for him, charging it just as he had charged his daughters with what they had received, respectively. The note, under the facts of that case, was therefore properly considered an advancement, and no question upon the statute of limitations could arise. The reasoning of *Thompson's Appeal*, as respects the statute of limitations, is, at best, obiter dictum, and is based upon *McClintock's App.*, 29 Pa. 360, which is referred to by the learned judge, delivering the opinion,

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to establish the proposition that the date of the death of the testator fixed the relations of the parties; and also upon the English case of *Courtenay v. Williams*, 3 Hare 539. But *McClintock's Appeal* was expressly overruled in *Yorks' App.*, 110 Pa. 69, and *Courtenay v. Williams*, as stated in *Reed v. Marshall*, 90 Pa. 349, is not in accord with the current of decisions under our statute of limitations. In *Milne's App.*, 99 Pa. 483, it was held, in direct denial of the doctrine of *Courtenay v. Williams*, that, in the distribution of a decedent's estate in the Orphans' Court, the indebtedness of a distributee to the decedent, against which the statute of limitations had run at the time of the decedent's death, could not be set off against his share. See also *Drysdale's App.*, 14 Pa. 531. The effect of *McClintock's Appeal* was to extend the rule applicable in cases of pure trusts, and enforceable in equity only, to distributions in the Orphans' Court. The doctrine of that case, however, had no application in personal actions at law against executors: *Mitcheltree v. Veach*, 31 Pa. 455; nor to a set-off in an action in the Common Pleas for a legacy: *Reed v. Marshall*, *supra*. Since the decision in *Yorks' Appeal*, however, these distinctions do not exist; the plea of the statute is as available in a distribution in the Orphans' Court as in actions at law in the Common Pleas.

"The relation which subsists between a creditor and the estate of his deceased debtor," said Mr. Justice PAXSON, in *Yorks' App.*, *supra*, "is that of debtor and creditor, with a trust superadded, by means of which, and the machinery of the Orphans' Court, he can demand his proportion of the trust fund after his claim has been established. When so established, it may be said to be seated on the trust, and there is some room for the application of the principle of *McClintock's Appeal*. But in attempting to establish it, the creditor is pursuing the estate of the decedent as his debtor; no other relation exists but that of debtor and creditor, and the statute of limitations may be set up in any forum which has jurisdiction of the case The fact that the creditor could sue at law and that the statute could be pleaded in such proceeding, is an answer to the assertion that there is a trust exclusively cognizable in equity. The right to plead it in one court and not in the other is, as before observed, an anomaly. I know of nothing

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to sustain it, and there is an overwhelming weight of authority against it." The same reasoning applies in this case. There was no evidence whatever that the notes represented sums received by way of advancement: the parties to these notes occupied the relation of debtor and creditor, and the ordinary and appropriate remedy upon the notes was in the Common Pleas; and, if the appellant's contention is sustained, we have again the anomaly of the right of a party, upon the same debt to plead the statute of limitations in one court, and not in the other. The general and well-settled rule, as stated by the learned judge below, is that, when the statute begins to run, it will not stop because of the death of either party: *Mitcheltree v. Veach*, *supra*; *Marsteller v. Marsteller*, 93 Pa. 350; *Amole's App.*, 115 Pa. 356; *Updegrove v. Blum*, 117 Pa. 259; and, since the decision of *Yorks' App.*, *supra*, this is a rule of general application. If the statute can be pleaded with effect when the decedent's estate is a debtor, we can see no good reason why it may not be pleaded also with like effect when the estate is a creditor: if the running of the statute should be stopped by the death in one case, why not in the other? There is no necessity arising out of the administration of the law, or the practice in equity, which calls for any such distinction; the legatees were as much entitled to the protection of the statute as any other creditor. Admitting the right of an executor, or of the heirs, in the distribution of a decedent's estate, to set off the debts of the legatees against their legacies, the debts, to constitute a valid set-off, should be valid, subsisting debts, not barred by the statute. If suits had been brought upon these notes before the bar of the statute, the validity of the debts evidenced thereby might have been established and their obligation continued; and, when so established, the executor's right to a set-off is inherent to the trust, and cannot be denied.

Nor do we think the allowance of a dividend out of the assigned estate of Levi Light, and payment thereof by the assignee, tolled the statute, either as an implied promise to pay or as an adjudication of the debt. The allowance and payment of the dividend was not the act of Levi Light, or of his agent, duly authorized. The assignee was not under the personal direction or control of the assignor: his duties were defined by law, and he could do nothing to bind the assignor, outside of

Syllabus.

the scope of his duty. No new promise of the assignor could be implied from the act of the assignee, who acted for himself, only, in the discharge of official duty. But the further discussion of this question seems useless, as the dividend was paid in April, 1881, eight years and more before the hearing by the auditor. Upon similar ground, the adjudication by the auditor cannot be accepted as an adjudication of the claim excepting as to the assigned estate. In a distribution in the Orphans' Court, as in *Reber's App.*, 125 Pa. 20, the adjudication is against the administrator or executor as the legal representative of the decedent; whilst, in the case of a distribution of an assigned estate, the adjudication is against a particular fund only.

We are of opinion that the learned judge of the court below was right in confirming the amended report.

The decree of the Orphans' Court is therefore affirmed, and the appeal dismissed at the cost of the appellant.

NO. 163.

OPINION, MR. JUSTICE CLARK :

For reasons stated in our opinion, in *David Light's Appeal*, No. 162 January Term 1890,

The decree of the Orphans' Court is affirmed, and the appeal is dismissed at the cost of the appellant.

136	222
136	222
136	222
140	447

136	222
147	130
147	557

136	222
f 211	*840
f 211	*494

ESTATE OF ESTHER HIGH, DECEASED.

APPEALS BY S. H. BOYER, S. L. KEIM AND W. K. RANDOLPH,
FROM THE ORPHANS' COURT OF BERKS COUNTY.

Argued March 4, 1890—Decided October 6, 1890.

[To be reported.]

1. When an executor's account has been confirmed and the money paid out under a decree of distribution, it is too late to have the account reviewed for the purpose of following the money in the hands of the distributees;

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and the decision in Keim's App., 125 Pa. 480, might well have been rested on this ground alone.

- (a) One to whom real estate had been devised for life with remainder to his children, but who never had any children, sold the land, as trustee, in pursuance of a decree under the act of April 18, 1853, P. L. 503. After his death, his executrix settled an account, charging herself with the principal arising from said sale as due to the estate of the devisor:
2. Such account having been confirmed, and said fund awarded by the Orphans' Court to the administrator de bonis non, etc., of the devisor, the executrix had no standing, at the audit of the administrator's account, to claim the fund back on the ground that the sale under the act of 1853 enlarged the life-tenant's estate to a fee.
3. As a general rule, no one can claim upon a distribution in the Orphans' Court except through the decedent, as creditor, heir or legatee; and the exceptions to this rule, established by such cases as *Marshall v. Hoff*, 1 W. 440, and *Miller's App.*, 84 Pa. 391, cannot apply when the fund has been judicially ascertained to belong to the decedent's estate.
4. Under a devise to one for life, with remainder to his children "or their heirs," the devisee having died without ever having had children, the remainder never vested in any one; and hence the reversion, subject to the life-estate, remained in the estate of the testator and passed under a residuary clause.

Before PAXSON, C. J., GREEN, WILLIAMS, McCOLLUM and MITCHELL, JJ.

Nos. 134, 140, 141 January Term 1890, Sup. Ct.; court below number and term not given.

On January 25, 1887, Abner K. Stauffer, administrator d. b. n. c. t. a., of the estate of Esther High, deceased, settled an account of his administration. The account, showing a balance due the estate of \$3,844.28, embraced on its debit side an item as follows: "Received of Sara L. Keim, executrix of DeBenneville Keim, deceased, as per adjudication filed on her account in the Orphans' Court of Berks County and now absolute, ... \$2,667.56."

On March 7, 1887, the account was called for audit before SCHWARTZ, P. J. Without the taking of any testimony, the hearing was adjourned from time to time, until after the determination of a proceeding, mentioned below, for the review of the adjudication in the estate of DeBenneville Keim, deceased, referred to in the account; but on May 25, 1889, testimony was submitted and the following facts were shown:

Esther High died unmarried in 1848, leaving to survive her,

Statement of Facts.

as next of kin, collateral relatives, and having made a will which was duly admitted to probate on May 5, 1848, the fifth clause whereof was as follows :

"5. I do hereby give, devise, and bequeath unto my two nephews, Isaac H. Keim and DeBenneville Keim, in common during life, the possession, use, benefit, rents, issues, and profits of all that certain one-acre (more or less) lot of ground, situate on the southwest corner of Fifth and Elm streets, in the borough of Reading, to be enjoyed by the said Isaac H. Keim and DeBenneville Keim during life ; and, immediately after their decease, the same shall descend to their children in equal shares, or their heirs, yet so that the children of each only divide between them the share which belonged to their father. And I do hereby further give and bequeath unto the said Isaac H. Keim alone during life, the yearly interest on one thousand dollars cash, and four shares of stock in the Farmer's Bank of Reading, and also one sixth part of a fifth part of the residue of my estate hereinafter mentioned, and one single bed, and immediately after his decease, the principal sum of \$1,000, bank shares, and sixth part of a fifth part of my estate, and a single bed, to be equally divided between his children or their heirs. And I do hereby further give and bequeath unto the said DeBenneville Keim alone during life the yearly interest on one thousand dollars cash, four shares of stock in the Farmers' Bank of Reading, one sixth part of a fifth part of the residue of my estate hereinafter mentioned, and my mahogany washstand, with marble slab, and all that belongs to it ; and immediately after his decease, the said principal sum of \$1,000, bank stock, sixth part of a fifth part of my estate, and a washstand, shall be equally divided between the children of the said DeBenneville Keim or their heirs."

The will contained a considerable number of devises and bequests to other relatives of the testatrix. Nearly all of them were made subject to limitations similar to those in the fifth clause, viz., to the devisee or legatee for life, and at his death to his children or their heirs. In some instances there were further limitations in the event of the death of such children without issue, before attaining the age of eighteen years. One of the bequests made was directed to revert to the residuary estate of the testatrix in case the life-tenant should die without issue.

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The residuary clause was as follows :

"16. All the remainder or residue of my estate, of whatever description the same may be or consist of, shall, after all the necessary expenses and the collateral inheritance taxes are paid out, shall be divided into five equal shares or parts, one of which shall be divided between the children of my brother, William High, or their heirs, in manner hereinbefore directed ; another of said fifth part shall be equally divided among the issue of my deceased sister, Mary Keim, as I have hereinbefore directed ; one fifth part to my sister, Susan H. Boyer, in manner as is hereinbefore directed ; one fifth part to my brother, John H. Nagle, in manner as hereinbefore directed ; and one fifth part to my niece, Sarah W. Moers, in such manner as is hereinbefore directed."

Neither Isaac H. Keim nor DeBenneville Keim ever had any children.

On February 16, 1856, Isaac H. and DeBenneville Keim presented a petition to the Orphans' Court of Berks county, reciting the devise of one acre of ground contained in the fifth paragraph of the will of Esther High, and also the residuary clause thereof ; praying for a sale of said real estate under the act of April 18, 1853, P. L. 503, and stating that it was the purpose of the petitioners "to bar any and every estate-tail, contingent remainder, or the right of the commonwealth to have inquisition of any estate defeasible." Thereupon the court awarded a citation, directed to certain persons named as having an expectant interest in the premises, requiring them to appear and answer the petition ; and upon the return of the citation, on April 14, 1856, the court decreed the sale of the property, appointing DeBenneville Keim trustee to make the sale. Subsequently, the trustee reported sales thereof, in separate parcels, which sales were duly confirmed by the court, and the proceeds thereof, aggregating \$5,504.12, were received by DeBenneville Keim as trustee.

In 1884, after the death of Isaac H. Keim, the one half of the principal arising from said sales, was paid by the trustee to the executor of Esther High, and was distributed by the Orphans' Court, in proceedings in her estate, to DeBenneville Keim and the children of his deceased brothers and sisters, the court holding that Isaac H. Keim, under the will of Esther

Statement of Facts.

High, took only a life-estate in the property devised and bequeathed to him thereby.

DeBenneville Keim died November 22, 1885, leaving a will, duly admitted to probate, whereby he made his wife, Sara L. Keim, his sole devisee and legatee and also his executrix. On April 28, 1886, she settled an account as "executrix of DeB. Keim, who was the trustee for the sale of real estate devised by Esther High," charging herself with the one half of the proceeds of the sales of real estate made by the trustee, and with four shares of bank stock. By an adjudication thereon, filed October 19, 1886, the Orphans' Court ordered the payment of the cash balance thereby exhibited, and the transfer of the bank stock therein mentioned, to A. K. Stauffer, administrator d. b. n., c. t. a., of Esther High, deceased. In accordance with this order, Mrs. Keim made the payment and transfer therein directed.

On May 2, 1887, Mrs. Keim petitioned the Orphans' Court for a citation upon A. K. Stauffer, administrator, etc., of Esther High, to show cause why her said account should not be reviewed and corrected by striking out therefrom the debit for proceeds of real estate, the petitioner averring that she had just been advised that the judicial proceedings in 1856 enlarged the estate of DeBenneville Keim to a fee-simple, and that, as his executor and sole legatee, the petitioner was entitled to the fund raised thereby. A demurrer and an answer to this petition having been filed, the Orphans' Court, after hearing, overruled the demurrer, but made a decree upon the merits dismissing the petition, which decree, upon appeal to No. 117 January Term 1889, Sup. Ct., was affirmed: Keim's App., 125 Pa. 480.

At the death of DeBenneville Keim, his next of kin were thirteen nephews and nieces, all grandchildren of his deceased mother, Mary H. Keim, to wit: four children of William H. Keim, a deceased brother; seven children of John H. Keim, a deceased brother; one son of Matilda Ludwig, a deceased sister; and one son of Emily Randolph, a deceased sister, namely, William K. Randolph.

After the hearing and argument, the court, SCHWARTZ, P. J., filed an adjudication in part as follows:

Adjudication.

This fund [the net balance for distribution to legatees, \$3,512.78] is claimed by three different parties :

1. By Sara L. Keim, sole legatee of DeBennville Keim, deceased. This court has decided several times that her testator had only a life-estate in the fund for distribution embraced in this account. The claimant, being dissatisfied, appealed, but took nothing under it: Keim's App., 125 Pa. 480. It cannot now find any reason for reversing itself, and the Supreme Court which affirmed it.

2. The whole body of testatrix's residuary devisees and legatees lay claim to this fund. The estate under the will is divided into five parts, between her brother, John H. Nagle, her sister, Susan H. Boyer, heirs of her brother, William High, deceased, heirs of her sister, Mary H. Keim, deceased, and her niece, Sarah H. Moers, daughter of Mrs. Moers, a deceased sister of the decedent.

All wills are construed from their four corners. The testatrix divided her estate, presumably from its context, into five equal shares to her heirs-at-law. But, further, she made all devises and legacies to the first takers for life, with remainder over to their "children or their heirs." Such being the case, the children necessarily took as purchasers. If some of the life-tenants died without leaving children, their estates, by the terms of the will, went to the heirs of the children, who, beyond all question, were their aunts and uncles and their heirs. The distribution is made accordingly to the heirs of Mary H. Keim, deceased.

3. It is further contended that in case the balance for distribution be awarded to the heirs of Mary H. Keim, the same must be distributed per stirpes to the several heirs of the children of Mary H. Keim; that is to say, it must be divided into four equal parts, and one share thereof distributed to the heirs of each of her four children.

This money must be distributed under the testatrix's will. She has not indicated the manner of distribution. The court takes it that the distribution must be made as if the decedent had died intestate, and as if the grandchildren of Mary H. High were the heirs of the decedent.

The statute of April 27, 1855, P. L. 368, was cited. Under it, it is argued that the distribution must be per stirpes. The

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act provides that grandchildren of brothers and sisters shall take by representation. This act extends the right of inheritance one degree among collateral heirs, and is peculiar in this, in that it enacts, where the heirs-at-law are nephews and nieces, and children of deceased nephews and nieces, the latter shall inherit their parents' shares. This act has no application to the case under consideration, there being no nephews and nieces, but only grand-nephews and grand-nieces.

These heirs inherit as next of kin. They all being of the same degree, distribution must be made equally between them.

—The auditing judge thereupon filed a distribution, in accordance with the foregoing, dividing the fund equally among the thirteen nephews and nieces of DeBenneville Keim above named, and decreed that the accountant make payment thereof accordingly.

Exceptions to the adjudication were dismissed by the court, SCHWARTZ, P. J., in the following opinion :

Three different parties, in as many interests, have filed exceptions to the adjudication.

Isaac Hiester, Esq., as counsel for Sara L. Keim, devisee and legatee of DeBenneville Keim, deceased, seeks through his objections to have the fund distributed to her under the will of her husband. The court has heretofore several times decided that DeBenneville Keim had only a life-estate in the fund for distribution, and as it continues of the same opinion, it dismisses his exceptions.

Cyrus G. Derr, Esq., counsel in behalf of the heirs of Esther High, generally, filed exceptions to the distribution. His contention for them is, that the fund in the account for distribution should have been distributed to the heirs of Esther High generally. This question has also been decided several times against them. The court, without going into the merit of his argument, but holding to its former findings and decisions, dismisses his exceptions, also.

Horace Roland, Esq., as counsel for Wm. Keim Randolph, also files a number of exceptions in his behalf, under which he contends that one fourth of the fund should be distributed to Wm. Keim Randolph, as the only child of Emily Susan Randolph, niece of the decedent and daughter of said Mary H.

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Keim, who was decedent's sister. In other words, the contention is that the distribution must be made per capita to the children of said Mary H. Keim, and per stirpes to their children, respectively, under decedent's will. The fund is realized through the failure of children of DeBenneville Keim, deceased, by reason of which it reverted to the estate of the decedent for distribution under her will. The same not prescribing the manner of distribution, the court holds that our intestate laws give the only light to its disposition.

The only other question raised for him, is as to the time this estate vested finally for the distributees. Was it at the time of the death of Esther High, or at the death of DeBenneville Keim, in 1885? There was a possibility of children by DeBenneville Keim, to the time of his death. No vesting in the heirs of the now distributees could take place during the lifetime of DeBenneville Keim. At his death, children became impossible. The final vesting of the estate happened at that time, and fixed the mode of distribution.

His exceptions are also dismissed, and the report upon adjudication is confirmed absolutely.

—Thereupon Sara L. Keim, executrix, etc., took the appeal to No. 140, specifying that the court erred:

1. In not distributing to the exceptant the sum of \$2,752.06 of the balance in the hands of the accountant, said amount being the proceeds of sale of real estate devised by decedent to DeBenneville Keim for life with contingent remainders over, which contingent remainders were barred by the said DeBenneville Keim under §§ 5, 6, of the acts of April 18, 1853, whereby his life-estate was enlarged into a fee, and the said proceeds of sale vested in him absolutely.

And Susan H. Boyer took the appeal to No. 134, specifying that the court erred:

3. In not distributing the fund in accordance with the provisions of the residuary clause of the decedent's will.

4. In not awarding one fifth of the fund to the appellant.

5. In distributing the fund to the heirs of Mary H. Keim, deceased.

And Wm. K. Randolph took the appeal to No 141, specifying that the court erred:

1. In distributing the fund to the grandchildren of Mary H. Keim, deceased, per capita.

Arguments.

Mr. Isaac Hiester, for Sara L. Keim, appellant in No. 140:

1. The devise in the fifth clause of Esther High's will vested in Isaac and DeBenneville Keim estates for life with remainders to their children: Keim's App., 125 Pa. 480. As no children were in existence, these remainders were contingent: *Jordan v. McClure*, 85 Pa. 495. At the time the will took effect, the law would have enabled the life-tenants to defeat the contingent remainders and to acquire the absolute estate, by suffering a common recovery to the use of themselves in fee: *Lyle v. Richards*, 9 S. & R. 322; *Abbott v. Jenkins*, 10 S. & R. 298. By § 5, act of April 18, 1853, P. L. 503, a method of barring contingent remainders by means of a judicial sale was provided, and, under the provisions of § 13, act of March 21, 1806, 4 Sm. L. 332, this statutory method superseded the proceeding by common recovery. The sale made in 1856 was conducted in accordance with the directions of § 5 of the act of 1853, and therefore the purchase money became the absolute property of the life-tenants: § 6, act of 1853.

2. It is sought by the appellees to avoid the effect of the positions above stated, on three separate grounds: (a) It is said that in 1884, on the death of Isaac, one half of the purchase-money was distributed by the Orphans' Court to the heirs of Esther High, including DeBenneville Keim, whereby his representatives are estopped from controverting the title of Esther High to the other half of it. We assert, however, that the persons to whom that distribution was made in 1884, were the heirs and next of kin of Isaac Keim, and that DeBenneville received only such portion as he was entitled to receive as one of such heirs and next of kin. (b) It is said that Keim's App., 125 Pa. 480, decides that DeBenneville, by the proceedings to defeat the contingent remainders, did not acquire an absolute estate in his half of the purchase-money, but an examination of the report will show that this court did not consider, much less decide, the effect of that proceeding. (c) It is said that no one can claim here except as creditor, legatee or next of kin of Esther High.

3. To the third position of the appellees there are two very sufficient answers. The first is, that the plan of distributing the fund to the representatives of the life-tenant under proceedings in the estate of Esther High, if not strictly regular,

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originated in 1884, as a convenient method of distributing Isaac's share, and was acquiesced in by the appellees, and Sara L. Keim simply followed, in the present instance, the practice then pursued. A mistake by which something has been included in an account not belonging there, may be corrected upon an adverse claim in the Orphans' Court: *Miller's App.*, 84 Pa. 391; *Malone's Est.*, 8 W. N. 179; *McCarron's Est.*, 15 W. N. 485. But, secondly, if the appellees were in a position to avail themselves of this objection, Mrs. Keim relieved the situation of all difficulty by presenting the petition which was before this court in *Keim's App.*, *supra*, asking for leave to withdraw the fund from this estate before distribution. In one way or another she is entitled to relief. We may remark that the demurrer to the form of the remedy in *Keim's Appeal*, was overruled by the voluntary answer upon the merits.

Mr. S. M. Meredith (with him *Mr. A. K. Stauffer*), for B. R. Keim and others, appellees in *Keim's Appeal*, No. 140:

1. Every question raised in this appeal was directly raised, argued, considered and passed upon in *Keim's App.*, 125 Pa. 480. After the decision therein, Sara L. Keim applied for a re-argument, and in her petition she distinctly asked this court to consider the very question which she now raises. The application was refused, and the point raised in the present appeal is therefore *res judicata*.

2. An insuperable obstacle in the way of the appellant is, that she had no status as a creditor or as a devisee of Esther High, whose estate alone is for distribution. In this proceeding, she cannot take the fund on the ground that it is part of the estate of DeBenneville Keim: *McBride's App.*, 72 Pa. 480; *Braman's App.*, 89 Pa. 78. A claimant adverse to the decedent's estate has no standing in a distribution in the Orphans' Court: *Gravenstine's App.*, 2 Penny. 61.

Mr. Cyrus G. Derr, for Susan H. Boyer, an appellee in No. 140, and appellant in No. 134:

1. The remainder given by the will to the children of Isaac and DeBenneville Keim was necessarily contingent, there being no such children in esse: *Jordan v. McClure*, 85 Pa. 495. The reversion of the entire fee-simple estate, subject to the

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life-estate, passed under the residuary devise: 2 Jarman on Wills, *647; Moreton v. Fossick, 1 B. & Ad. 186; Brown v. Boyd, 9 W. & S. 123; Keim's App., 125 Pa. 480. While the remainder to DeBenneville's children could not vest, because there were no children in being, the interest of the residuary devisees in this property was a vested one, although liable to open and let in the children of DeBenneville, had such ever come into being: Roe v. Davis, 1 Y. 332, and authorities therein cited.

2. Whatever the effect of the proceedings under the act of April 18, 1853, P. L. 503, upon the contingent remainder in favor of DeBenneville's children, it could not impair the vested interests of the residuary legatees. Under the provisions of the act, the proceeding bars simply estates-tail and contingent remainders, not vested interests, and is to have "the effect of any other proceeding" for that purpose. It is perhaps correct that it is the equivalent of a common recovery; but a common recovery does not affect a vested remainder. Its operation is to destroy the particular estate by forfeiture, and the contingent remainder, dependent thereon, then falls for want of support: Dunwoodie v. Reed, 3 S. & R. 435; Lyle v. Richards, 9 S. & R. 322; Abbott v. Jenkins, 10 S. & R. 296. Not only did the proceeding fail to affect injuriously the vested remainder of the residuary devisees, but they might, under the doctrine of forfeiture, have entered at once into possession.

Mr. Hiestor, in reply to *Mr. Derr*:

The ulterior limitation to the residuary devisees was not a vested remainder, but an alternative contingent remainder: Roe v. Davis, 1 Y. 332; Dunwoodie v. Reed, 3 S. & R. 435; Stump v. Findlay, 2 R. 168; Waddell v. Rattew, 5 R. 231. A common recovery defeats the ulterior limitation, no matter what it is: 2 Bl. Com., 361; Taylor v. Taylor, 63 Pa. 486. If, as contended, the residuary devisees might at once have entered into possession of the property, they are now barred by the statute of limitations: Trickett on Limitations, § 99; Marple v. Myers, 12 Pa. 126; Baldrige v. McFarland, 26 Pa. 339. DeBenneville Keim's possession of this money was adverse for more than thirty years.

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Mr. S. M. Meredith (with him *Mr. A. K. Stauffer*), for the appellees in Boyer's Appeal, No. 134:

The principle of construction laid down by the court below is fully supported by the authorities. The intention of the testator is to be gathered, not from the terms of a particular devise, but from the whole scheme of the will: *Middleswarth v. Blackmore*, 74 Pa. 414; *Ferry's App.*, 102 Pa. 207. Taking this will as a whole, it is evident that one of the fixed aims and purposes of the testatrix was that the chief part of her estate should go to and remain in the branch of the family to which she gave it. She could not have meant that this fund should in any event go back into her general residuary estate. If she had, she undoubtedly would have said so.

Mr. Horace Roland, for Wm. K. Randolph, appellant in No. 141:

The distribution should have been made under the will of Esther High, not under the intestate laws. A will should be so construed as to avoid a partial intestacy if possible: *Little's App.*, 81 Pa. 190; *Raudenbach's App.*, 87 Pa. 51; *Board of Missions' App.*, 91 Pa. 507. As the life-tenants had no children, the remainder vested at once under the will in the next of kin of the life-tenants who were then living. The law favors vesting rather than contingency: *Chess's App.*, 87 Pa. 362; *Churchman's App.*, 22 W. N. 131; *McClure's App.*, 72 Pa. 415; *Buzby's App.*, 61 Pa. 111; *Provenchere's App.*, 67 Pa. 463; *Lantz v. Trusler*, 37 Pa. 482. The children of those in whom a devise has vested are entitled to the shares of their deceased parents: *Young v. Stoner*, 37 Pa. 105. Should this remainder be treated as part of the residuary estate, the distribution must still be per stirpes.

Mr. S. M. Meredith (with him *Mr. A. K. Stauffer*), for the appellees in Randolph's Appeal, No. 141:

The time as of which this distribution is to be made is the date of DeBenneville Keim's death, for the reason that until then there was always the possibility of his leaving issue and of there being nothing upon which the residuary clause of the will could operate: *Cote v. VonBonnhorst*, 41 Pa. 243. At that time the act of June 30, 1885, P. L. 251, directing a per capita distribution when all who are entitled to take stand in the same degree of consanguinity to the decedent, was in force.

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KEIM'S APPEAL.

OPINION, MR. CHIEF JUSTICE PAXSON :

It was held in Keim's App., 125 Pa. 480, that under the will of Esther High, deceased, Isaac H. Keim and DeBenneville Keim took but a life-estate, with remainder to their children respectively. Our attention is now called to the fact that in 1856, the said life-tenants, Isaac H. Keim and DeBenneville Keim, obtained an order of sale under the act of 1853, known as the Price Act, for the purpose of barring contingent remainders, and that the real estate was sold in pursuance thereof. It is claimed that the remainders to the children were contingent, and were therefore effectually barred by the proceedings referred to; that by reason thereof the life estates were enlarged into a fee. This question does not appear to have been discussed either in the court below, or here, in Keim's Appeal, and will not be discussed now for the reasons hereafter stated.

On the death of Isaac H. Keim, in 1884, intestate, his one half of the purchase-money, \$2,752.06, was returned to the executor of Esther High, deceased, and was distributed by him to the heirs and next of kin of said Isaac H. Keim, in obedience to the adjudication of the Orphans' Court. With this money we have no concern.

On the death of DeBenneville Keim, in 1886, the other half of said sum, viz., \$2,752.06, was in his hands as trustee in the proceedings under the Price Act. Sara L. Keim, the appellant, was executrix and sole legatee under his will. She did not then claim the money as belonging to his estate. On the contrary, she filed her account as executrix of said DeBenneville Keim, in which she charged herself with his share of the proceeds of the sale as due and belonging to the administrator de bonis non, cum testamento annexo, of Esther High, deceased, which account was confirmed, distribution ordered in accordance therewith, and the money actually paid to Abner K. Stauffer, the administrator, etc., of Esther High's estate. Subsequently, the appellant petitioned the court below for a bill of review and for a re-statement of her account, upon the ground that she had been advised that the sale in 1856 had enlarged her husband's estate to a fee, and that as his executrix and sole legatee she was entitled to the fund. The court below refused her application, and denied the review. Mrs. Keim

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appealed from this decree, and the case is reported as Keim's Appeal, *supra*.

The decree was affirmed here, principally upon the ground that DeBenneville Keim took but a life-estate under the will of Esther High. That is not the only ground, however, upon which that decision can be supported. In the court below, the respondent had filed an answer, and also a demurrer to the petition, alleging that the Orphans' Court had no power or jurisdiction to grant the relief prayed for. In reference to this, it was said by our Brother STERRETT, in the concluding sentence of his opinion: "As to the other question, we incline to think the appellee's demurrer should have been sustained, but the decision of the court being in favor of the appellant, the question is not necessarily before us." The question was not discussed, because it was not considered necessary. Yet the decision of the court might well have been rested upon this ground alone. Her account had been confirmed, and the money paid out in obedience to the order and decree of the Orphans' Court. It was then too late to have a review of her account for the purpose of following the money in the hands of the person to whom she had paid it. The act of assembly is explicit that a review shall not be granted after the fund is distributed. For these reasons, it is unnecessary now to discuss the effect of the proceedings to bar contingent remainders under the act of 1853.

The account now before us and upon which the present contention arises, is that of Abner K. Stauffer, administrator de bonis non, cum testamento annexo, of Esther High, deceased. The fund for distribution is composed in part of the money paid to the said administrator, under the order of the Orphans' Court, by Sara L. Keim, executrix of DeBenneville Keim, deceased. This clearly appears by the following debit in the account of the administrator: "Received of Sara L. Keim, executrix of DeBenneville Keim, deceased, as per adjudication filed on her account in the Orphans' Court of Berks county, and now absolute, \$2,667.56." This money was claimed by the said Sara L. Keim, the appellant, before the auditing judge, upon the ground that it was her money, having been paid to the administrator of Esther High, deceased, in mistake, and in ignorance of her rights. The learned judge rejected the claim

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in this somewhat terse opinion: "This court has decided several times that her testator had only a life estate in the fund for distribution embraced in this account. The claimant, being dissatisfied, appealed, but took nothing under it: Keim's App., 125 Pa. 480. It cannot now find any reason for reversing itself, and the Supreme Court which affirmed it." From this decision the present appeal was taken.

The appellant does not claim under the will of Esther High; on the contrary, she claims as the sole legatee, under the will of DeBenneville Keim, a fund which has been judicially determined to belong to the estate of Esther High. The proceedings below and here settle this question beyond all controversy. If we concede that a mistake was made by the appellant, we cannot correct it now. Something is due to the finality of judicial proceedings. The appellant is confronted at the very threshold of her case by decrees of the Orphans' Court, in full force and unreversed, which are a flat bar to her claim. The fund having been judicially ascertained to belong to the estate of Esther High, it is clear that the appellant cannot claim adversely to that estate. The general rule that no one can claim, in the distribution of a fund in the Orphans' Court, except through the decedent, as creditor, legatee, or next of kin, is settled and unquestionable: McBride's App., 72 Pa. 480; Braman's App., 89 Pa. 78; Gravenstine's App., 2 Penny. 61; Winton's App., 111 Pa. 387. The case differs essentially from the line of cases of which *Marshall v. Hoff*, 1 W. 440, and *Miller's App.*, 84 Pa. 391, may be said to be typical, which establish the exceptions to this rule, and hold that the fund may be shown to be wrongfully included in the account, either because, though in the name of the decedent, it is really a trust, or because the title is in another person. There is no room for the application of this principle, for the reason, before stated, that this fund has been judicially ascertained to belong to the estate of Esther High.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

BOYER'S APPEAL.

OPINION, MR. CHIEF JUSTICE PAXSON:

This was an appeal from the decree of the Orphans' Court

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of Berks county, distributing the fund in the hands of the administrator de bonis non, cum testamento annexo, of Esther High, deceased. The fund is the proceeds of the share devised by said Esther High to DeBenneville Keim, and which, after his death, was sold and the proceeds brought into this account for distribution. For the purposes of this case we must treat the interest of DeBenneville Keim as a life-estate only, with remainder to his children: Keim's App., 125 Pa. 480. DeBenneville Keim died without children, and the question now is, to whom is the fund to be distributed?

It is proper to remark as a preliminary that we are distributing the estate of Esther High, not that of DeBenneville Keim. In the devise to Isaac H. Keim and DeBenneville Keim the testatrix uses this language: "To be enjoyed by the said Isaac H. Keim and DeBenneville Keim during life; and, immediately after their decease, the same shall descend to their children in equal shares, or their heirs, yet so that the children of each only divide between them the share which belonged to their father." The learned judge below held that although DeBenneville Keim never had any children, yet the estate should go to the heirs of the children, or to those who would have been their heirs had there been children. This sufficiently appears from the following extract from the opinion of the Court: "If some of the life-tenants died without leaving children, their estates, by the terms of the will, went to the heirs of the children, who, beyond all question, were their aunts and uncles and their heirs. The distribution is made accordingly to the heirs of Mary H. Keim, deceased." Notwithstanding this, we do not see very clearly how the estate of Esther High is to be distributed to the heirs of Mary H. Keim.

As before observed, the devise was to DeBenneville Keim for life, with remainder to his children. Under it he did not take a freehold of inheritance: Keim's App., supra. The remainder was contingent upon his having children. He had no children, either when the will was made, or when he died. Hence the remainder never vested in any one, and there was no limitation over. It follows that the remainder was not disposed of; it remained in the estate of Esther High, and passed under the residuary clause of her will. In *Brown v. Boyd*, 9 W. & S. 123, it was held that where in a devise the testator

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grants less than his entire estate, leaving a reversion undisposed of, such reversion will pass under a residuary clause. The residuary clause in the will of Esther High is as follows: "All the remainder or residue of my estate, of whatever description the same may be or consist of, shall, after all the necessary expenses and the collateral inheritance taxes are paid out, shall be divided into five equal shares or parts, one of which shall be divided between the children of my brother, William High, or their heirs, in manner hereinbefore directed; another of said fifth parts shall be equally divided between the issue of my deceased sister, Mary Keim, as I have hereinbefore directed; one fifth part to my sister, Susan H. Boyer, in manner as is hereinbefore directed; one fifth part to my brother, John H. Nagle, in manner as hereinbefore directed; and one fifth part to my niece, Sarah W. Moers, in such manner as is hereinbefore directed."

With this plain direction as to what should be done with her estate, it is needless to speculate as to the intent of the testatrix. She has expressed it in language free from ambiguity. In construing this will, in Keim's App., supra, the opinion was expressed that this money, which represented the land, reverted to the estate of Esther High, and was to be distributed under the residuary clause of her will. It is true, the question of distribution was not directly involved in that case, and the remark may be regarded as dictum, yet the point was so clear that we did not suppose it would ever be questioned. We are of opinion that the fund in controversy should be divided into five equal parts or shares, and distributed as directed by the residuary clause of the will of Esther High.

All the assignments of error are sustained.

The decree is reversed; and it is now ordered that the record be remitted to the court below, with directions to make distribution in accordance with this opinion, the costs of the appeal to be paid by the appellees.

RANDOLPH'S APPEAL.

OPINION, MR. CHIEF JUSTICE PAXSON:

This appeal is from the same decree as Keim's Appeal and Boyer's Appeal, just decided. While the appellant concedes

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that the fund should be distributed to the thirteen grandchildren of Mary H. Keim, yet he contends that it should be distributed per stirpes and not per capita, as ordered by the court. This is his principal grievance. As we have decided in Boyer's Appeal that the fund was to be divided into five equal parts and distributed under the residuary clause of the will of Esther High, this appeal is not of much importance and the respective assignments need not be discussed. As the principle upon which the distribution was made is erroneous, we need not consume time with the details. The decree is reversed upon this appeal and distribution ordered in accordance with the opinion in Boyer's Appeal.

Decree reversed at the costs of the appellees;
and it is ordered that the record be remitted
with instructions to make distribution in accordance
with the opinion in Boyer's Appeal.

ESTATE OF MAHLON MILLER, DECEASED.

APPEAL BY DAVID MILLER ET AL. FROM THE ORPHANS' COURT
OF BERKS COUNTY.

Argued March 5, 1890—Decided October 6, 1890.

[To be reported.]

1. When one has rendered personal services to another, merely upon the expectation of a legacy promised, without a contract obligation, the promisee takes his chances of receiving the legacy, and if his expectations are disappointed he can recover nothing.
2. To sustain a claim against the estate of a decedent, for services rendered under an alleged contract to pay for them after death, either specifically or by way of a legacy, it is indispensable that there be proof of the services actually rendered.
3. Evidence, in support of such a claim, which fails to show either the terms of a definite contract to pay, or what services were rendered from which a contract to pay can be implied, is insufficient to authorize the allowance of payment.

Before PAXSON, C. J., GREEN, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 308 January Term 1890, Sup. Ct.; court below, number and term not given.

136	239
153	484
136	239
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1225	*374
418C	*128

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On April 8, 1889, David and William Miller, administrators of the estate of Mahlon Miller, deceased, settled their first account in said estate, which on June 3, 1889, was called for audit before SCHWARTZ, P. J.

At the hearing, Israel Miller presented a claim against the estate for \$5,000, upon an alleged contract with the decedent, for services rendered and to be rendered by the claimant. The testimony of witnesses called by the claimant tended to show that he and the decedent were not related; that they lived part of the time a half mile, and afterwards two and one half miles from each other; that the decedent sometimes boarded with the claimant, and the claimant sometimes brought provisions to the decedent; that the decedent at different times declared to other persons that the claimant had rendered service to him in the way of work and the use of horses and he owed the claimant \$5,000 for his services, was going to give him that sum and had promised him to do so, in some instances stating that he was going to give him the \$5,000 after his death. One witness, Augustus Fritz, testified to a conversation, in his presence, between the decedent and the claimant, in the fall of 1886, in regard to the work that the claimant had done, in which the decedent asked the claimant if he would be satisfied with \$5,000; that the claimant replied that he would, and the decedent then said, "I will give you the \$5,000 if you are satisfied." There was testimony that some time in 1887 the decedent made a will in which he bequeathed \$5,000 to the claimant, but about four or five months afterward he destroyed it, and died intestate, April 28, 1888. The testimony relied on to establish the claim is fully quoted in the opinion of the Supreme Court, *infra*.

After hearing and argument, an adjudication was filed as follows:

Counsel for Israel Miller presented a claim against the estate of \$5,000, founding the same upon an express contract with the decedent for services rendered and to be rendered, horse hire, and for other causes and reasons rendered and furnished by the claimant to the decedent. The question for consideration is, is he entitled, under the evidence, to the \$5,000, or only to the value of his services, horse hire, etc.?

Our courts appear to have divided cases of this kind into

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two distinct classes. In cases where it is established by "direct and positive" testimony that the services done, the things given and supplied, were to be compensated by a fixed sum of money, or by any specified goods, or by the conveyance of certain lands, the measure of damages for the non-performance of the agreement is the amount of money promised to be paid, a sum of money equal to the value of the goods or the value of the lands. *Bash v. Bash*, 9 Pa. 260, decides that where a son remains with his father after his majority, and upon an express contract that he would leave him his farm for the services at his death, the measure of damages for the non-performance is the value of the lands. *McDowell v. Oyer*, 21 Pa. 417, is to the same effect. *Thompson v. Stevens*, 71 Pa. 161, decides that where a decedent in his lifetime agrees with his servant to provide for her at his death, to the extent that she need not thereafter do any work for a living, the contract is to be literally fulfilled, and the measure of damages for the non-performance thereof is a sufficient sum of money to keep and maintain her in accordance with the terms of the contract. *Snyder v. Castor*, 4 Y. 353, is to the same effect. In all cases in which the evidence is less definite, direct and positive, as to the consideration, the rule of law is, that the damages for the breach of contract are the value of the services upon a quantum meruit: *Graham v. Graham*, 34 Pa. 475. The question here arises, under which of these classes does the case under consideration fall?

The facts submitted by the evidence are as follows: Augustus Fritz testified that "decedent told him in the fall of 1886 he would not pay Israel Miller for the things he was getting, but would give him \$5,000 for what he got of him, but would not pay him in his lifetime. He further says that in Mahlon Miller's room, "I heard Mahlon and Israel speaking together about this matter, and Mahlon then said he would give Israel \$5,000, and asked Israel if he would be satisfied with that, and Israel said he would." The same witness also says that Mahlon told him he had promised Israel \$5,000 for services. Upon cross-examination, witness said that he, addressing Israel, asked, "if I give you \$5,000 will you be satisfied? Then Israel replied, "if you give me \$5,000 I will be satisfied," and that

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Mahlon answered that he would give him \$5,000; and further said that the subject was broached by the decedent.

This testimony is strongly corroborated by Benjamin F. Smith, Edward Sheetz, Franklin James, Joseph H. Houck and I. C. Becker, all of whom testified that he told them he owed Israel Miller \$5,000 for services rendered, horse hire, boarding, sending him victuals, and for good and kind acts done and shown him. Several of them also testified that he had admitted to them he had promised Israel Miller to pay him \$5,000, after his death, for what he gave him and did for him.

This testimony, exclusive of that of Benjamin F. Smith, which is somewhat impeached, is direct and positive, strongly supported by admissions and declarations of the decedent. It clearly shows, beyond any doubt, that [the decedent had an express contract with the claimant to pay him \$5,000, after his death, for such services as the claimant had or might render him, etc. The claimant accepted decedent's terms; that is, he did not ask for a settlement during his lifetime, and now looks for his \$5,000 as per contract between them.]¹

The question of want of consideration is also raised. It is, however, too evident to admit of argument that claimant rendered service to the decedent, and that he was also otherwise indebted to him. The evidence does not disclose the amount of such indebtedness, but certainly shows a sufficient consideration to sustain an express contract.

In passing upon this question, it is proper to take into consideration the decedent's habits of life and characteristics. He was old, when he entered into this contract; peculiar, a bachelor, somewhat bitter towards some of his relatives, living at times by himself, doing his own cooking and housekeeping, and fond of money making. It is also fair to conclude from the evidence that he desired the friendship of the claimant to the end. Hence he dreaded a settlement with him; fearing a disagreement between them, and having use for him, he contracted in settlement of the claim for the payment of \$5,000 after his death.

The court allows the entire claim of \$5,000.

The foregoing adjudication was filed December 4, 1889, and

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confirmed nisi. No exceptions being filed thereto, the confirmation became absolute; whereupon the administrators, and William Miller, on behalf of himself and the other heirs of the decedent, took this appeal, specifying that the court erred:

1. In making the finding embraced in []¹
2. In awarding \$5,000 to the claimant.

Mr. D. E. Schroeder and *Mr. Jeremiah Hagenman*, for the appellants:

1. The court below was unfortunate in its citation of authorities. *Bash v. Bash*, 9 Pa. 260, in so far as it appears to sustain the court, and *McDowell v. Oyer*, 21 Pa. 417, belong to the line of cases following *Jack v. McKee*, 9 Pa. 235, which are overruled in *Hertzog v. Hertzog*, 34 Pa. 418. A comparison of the testimony with the findings of the court will show great inaccuracies and unwarranted inferences and presumptions in the latter. There is no proper and sufficient evidence of any such agreement as the court finds, nor is it shown that the claimant continued to render services down to the decedent's death. The testimony of Fritz presents the only direct evidence of anything like an agreement, but it does not constitute clear and satisfactory proof of a contract between the parties, like the express contract found by the court: *Hertzog v. Hertzog*, 29 Pa. 465; 2 Bouv. Law Dict., 204; *Kyle v. Wells*, 17 Pa. 290.

2. Such a contract, as is alleged here, should be proved by direct and positive evidence, and its terms must be definite and clear: *Hertzog v. Hertzog*, 29 Pa. 465; *Graham v. Graham*, 34 Pa. 475; *Hartman's App.*, 3 Gr. 276; *Pollock v. Ray*, 85 Pa. 428; *Bash v. Bash*, 9 Pa. 262; *Thompson v. Stevens*, 71 Pa. 161; *Murray's Est.*, 24 W. N. 175. The indefiniteness of this alleged contract, as to the services to be compensated, prevents its enforcement: *Walls' App.*, 111 Pa. 460. One who performs services for another in expectation of a legacy, cannot recover therefor: *Little v. Dawson*, 4 Dall. *111. It was unnecessary to file exceptions to the adjudication. The court below being a separate Orphans' Court, its adjudication itself is a definite decree from which an appeal lies: *Rhoads's App.*, 39 Pa. 186.

Opinion of the Court.

Mr. John F. Smith, for the appellee :

1. No exceptions were filed in the lower court to its findings, and therefore this court is not obliged to review the testimony unless the justice of the case requires it: *Hise's Est.*, 5 W. 157; *Irwin's App.*, 5 Wh. 577; nor, unless gross error has been committed: *Piper's App.*, 20 Pa. 67. The court must have found full performance of all the services contemplated by the contract. Every fact essential to the decree must now be presumed to have been found. Moreover, the findings are fully justified by the uncontradicted testimony.

2. In none of the cases cited by the appellant was there an express contract in which the parties came face to face. There can be no question in this case as to the mutuality of the obligation. The claimant was bound to accept the \$5,000 as a full compensation for his services, and the decedent, or his representatives, to pay that amount. In *Thompson v. Stevens*, 71 Pa. 161, a verdict for \$10,000 was sustained upon evidence far less definite than in the present case.

OPINION, MR. JUSTICE GREEN :

The appellee, in support of his claim against the decedent's estate, examined five witnesses. The last of them, *Jesse H. Houck*, testified as follows: "I knew *Mahlon Miller* since 1848. He told me that he had promised *Israel* \$5,000; that he was burnt out and had a big loss, and 'I am going to make him better off than he was before.' He said *Israel* had done a good many things for him: if he wanted anything he could go just there and get it as if *Israel* was at home. I know *Israel* brought him provisions. I could not tell what kind; he had it in a basket or bucket. . . . I understood, from what *Mahlon* said, he was going to leave *Israel* \$5,000 after his death, in his will. . . . He told me this often." It is scarcely necessary to say that the testimony of this witness does not exhibit a single element of a contract liability. It is, at the utmost, proof only of a declaration of the decedent that he intended to give a legacy of \$5,000 to the appellee, which intention he did not execute. It is, however, of some value in considering a portion of the testimony of the other witnesses. The promise was not made to the appellee, but to a stranger, and appears to have proceeded from a desire to make a gift to the appellee,

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to make up a loss by fire which he had sustained. In no possible view of the case, can this testimony be regarded as in the least degree supporting the claim of a contract relation.

The next witness for the appellee was Franklin James, who testified: "I was acquainted with Mahlon Miller; knew him twenty years. He told me that he owed Israel \$5,000 for the good services he had done him. Cross-examined: Israel never heard him say this to me. Mahlon said Israel had been good to him, had done him a good many favors, never made a demand on him; and that he was going to give him \$5,000. . . . He told me that he had told Israel; that he spoke with Israel and promised him \$5,000 for the work he had done for him; and he had been good to him, and could get a horse whenever he wanted one." Had there been real proof by other testimony of actual service rendered by appellee to the decedent, at all approximating the value of \$5,000, this testimony would have afforded a slight inference that the decedent was inclined to give that amount to the appellee, whether as a donation or as compensation cannot be told from this testimony, but as there is no such evidence anywhere in the case, there is no basis for such an inference. As the witness says the decedent told him that Israel never made a demand on him, that he was going to give him \$5,000, it really proves nothing more than an unexecuted promise to make a gift.

The next witness for the appellee was Edward Sheetz. He said: "I was acquainted with Mahlon Miller; knew him very well; he lived with us four months in 1886. He said he was going to give him \$5,000; he had been good to him. He hired his horse from him; whenever he came for a horse he (Israel) never refused him. He always said he had promised Israel \$5,000, and he should have it, but he did not specify any time. . . . He never said he was going to give Israel \$5,000; he said he owed it to him and was going to give it to him. He never said this to Israel in my presence." The whole substance of this testimony is that decedent told the witness that he was going to give Israel \$5,000, without specifying any time. The only reason assigned by decedent, according to this witness, for his intention to give \$5,000 to Israel, was that Israel had been good to him, and that he hired a horse from Israel whenever he wanted one. Neither the actual perform-

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ance of any service for the decedent, nor the terms of any contract for the payment for such service, nor the time when the \$5,000 was to be given, nor whether it was to be in Mahlon's lifetime or by way of a legacy, nor the fact that it was to be done in pursuance of any contract between them, appears in the testimony of the witness, and hence it must be discarded for any useful purpose in the case.

The next witness was B. F. Smith, who testified: "I knew Mahlon Miller; he was not married. His method of living was very peculiar. He lived by himself; he lived like a hermit, and had plenty of money." After detailing a trifling conversation which he had with decedent on the road, one day, he said, speaking of decedent in that conversation: "He says, 'I am indebted to Israel Miller, at Douglassville, Dutch Is., \$5,000 for what he has done for me.' I says, 'Why, how do you owe him that much? What did he ever do for you?' He says, 'I guess I can do as I please with my money.' I said, 'Yes, it would come very handy to Is.; he was burnt out and lost all he had in the barn.' He says, '\$5,000 would fix him better than he was before he was burnt out.' I then asked him what he owed him this money for. He said for horse-hire, board, etc. He said he never handed in his bill. When I told Mahlon Miller about Israel's having been burnt out, Mahlon said, 'I owe him \$5,000, and that will make him better than he was before.' In the conversation he said he told Israel Miller that he was going to give him \$5,000; that Israel was aware of it and he was to have it." This testimony is like the rest; not a word about a contract for the payment of services actually rendered, nor any statement of the terms of such a contract, nor anything said as to when or how the money was to be given; but quite a distinct statement that what decedent said was, that he was going to give Israel the \$5,000 because he had a right to do as he pleased with his own. As this is nothing but a promise, a statement of an intention merely, to give Israel a sum of \$5,000, it goes for nothing more than an unperformed intent to give a legacy.

The only remaining witness, and the one whose testimony was chiefly relied upon by the learned court below, was Augustus Fritz. After stating that he was intimately acquainted with decedent, he was asked if he knew of any arrangement

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or contract between Mahlon Miller and Israel Miller, and he answered: "Israel Miller done some work for decedent, a good deal of work, and if he wanted a horse or anything, he would just go into the stable and take one. Decedent boarded there considerable. Israel took provisions to decedent; decedent told me that he would not pay Israel for the things he was getting, but he would give him \$5,000 for what he got of him, but would not pay him in his lifetime. Mahlon Miller did not say that he had any arrangement with Israel about these things, but he said he would give him \$5,000 for what things he had of Israel. In Mahlon Miller's room I heard Mahlon and Israel speaking together about this matter, and Mahlon then said he would give Israel \$5,000, and asked Israel if he would be satisfied with that, and Israel said he would. Yes, Mahlon told me he had promised Israel \$5,000 for his services." After stating that at one time Israel lived about half a mile from Mahlon, but now he lived about two and a half miles from him, he said: "I only knew from what decedent told me himself, that Israel did a great deal of work for him; decedent told me many a time, he told me about two years ago; decedent boarded with Israel off and on; all I know is what Mahlon told me about the services. Mahlon told me that Israel brought provisions to him; Mahlon told me that he would not give Israel anything for his services, but he would leave him \$5,000 after his death. . . . What I mean by provisions, in my testimony, is that Israel brought cooked things to Mahlon's house while he was sick. . . . I knew him forty years; lived in the same neighborhood. He worked for me and I worked for him. During the last five years Mahlon used to speak to me about Israel. It was during this five years Mahlon used to tell me he was going to give Israel \$5,000, and Israel must have done the work before that time. I don't know that Israel worked for Mahlon during the last five years of his life." If the testimony of the other witnesses had possessed any virtue as establishing a contract relation between these parties, it was entirely destroyed by the testimony of this witness. He testified emphatically, distinctly, and positively, that decedent told him he would not pay Israel for what he got of him, in his lifetime, but would give him \$5,000 after his death; that he did not say he had any arrangement with Israel about these things,

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but he would give him \$5,000 for what he had of Israel. According to this witness there was to be no payment of anything during Mahlon's life, but he said there was a promise to give \$5,000 after death.

If this was a contract and actual service had been performed on the faith of it, the performance of the service would be a good consideration for the promise, although the money was not to be paid till after death. But there are two radical difficulties in the way of the application of that doctrine. The only witness who testifies to it says the services must have already been performed before the time of the promise, and that he did not know of any work done by Israel for Mahlon after that time. And the other great overshadowing obstacle in the way of recovery, is the utter absence of proof of the services. It is perfectly manifest that the claim cannot be sustained upon the footing of an express contract, with definite terms for the payment of money during the life of the decedent, for any services, or any other consideration, because there is no proof of such a contract. It is equally clear that as a mere promise to give \$5,000 by way of a legacy, it cannot be sustained, because, if the service, whatever it was, was rendered merely on the expectation of a legacy, the promisee takes his chances, and if he is disappointed he can recover nothing: *Pollock v. Ray*, 85 Pa. 428; *Thompson v. Stevens*, 71 Pa. 161; *Neal v. Gilmore*, 79 Pa. 421. But to sustain the claim upon the ground that the alleged promise was to pay after death, either specifically or by way of a legacy, it is indispensably necessary that there should be proof of the services actually rendered. We have searched this record in vain for proof of such services. The decedent was an unmarried man, living by himself, and continued to do so until the time of his death. The appellee lived at a distance from him; once as close as half a mile, and also at a distance of two and a half miles. There was no proof of services by way of nursing, or taking personal care of decedent, or even that he was sick or infirm so as to require such care. What services the appellee rendered to decedent we are not told by any witness in the case. Fritz says: "Israel Miller done some work for decedent, a good deal of work," but that is all. What the work was, or how much of it there was, or when it was done, or how long it

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continued, he does not pretend to say, and these subjects must all be left to the imagination. Whether it was common day labor or the work of a mechanic is not stated, but whatever it was, Fritz says he does not "know that Israel Miller worked for Mahlon during the last five years of his life." Now, Fritz lived in the same neighborhood with decedent, and if Israel was doing work for Mahlon he had ample opportunity to see it; but he says he only knew from what Mahlon told him that Israel had done work for him. Not a solitary witness testifies that he ever saw Israel doing any work of any kind for Mahlon, or had any knowledge upon that subject. It is absolutely impossible, now, to discover a single fragment of testimony upon this whole record that any actual, real work or service of any kind was ever done by the claimant for the decedent. There was a little testimony about some boarding and horse hiring, furnished to the decedent by the appellee, but it is of the most shadowy and uncertain character, and not described by any one having personal knowledge. Moreover, there is not a particle of proof how much boarding there was, nor how often a horse was hired; and if this were an action to recover upon a quantum meruit, no basis of proof could be found upon which to fix any definite amount of compensation whatever.

The plain truth about this claim is, that it is one of the worst and weakest in substantial merit that ever gets into the courts. In the great majority of this class of cases there is abundant proof of actual service rendered, and the difficulty lies in defective proof of a specific contract, or in the family relation of the parties. But here is an utter failure to prove the fact of any services whatever actually rendered. It is eminently one of the numerous class of cases which we have so often condemned, in which claims are preferred against dead men's estates after the principal party is in his grave, never presented while he was living, and generally supported by loose, uncertain, oral testimony of declarations and admissions of the most unsatisfactory character. Our continuing experience warns us against them, and we do not propose to relax the rules which we have frequently expressed for dealing with them. It is not unlikely that the decedent had expressed an intention to give the appellee a legacy of \$5,000 out of his estate, and there was some testimony to the effect that he did once

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execute a will with such a legacy contained in it, but he subsequently destroyed that will and died intestate. But a disappointed claim for a legacy cannot be compensated by setting up an unfounded claim for alleged services, without lawful testimony to support it. We are of opinion that the claim of the appellee should have been rejected.

The decree of the court below is reversed at the cost of the appellee; and the record is remitted with instructions to strike out the allowance of \$5,000 to Israel Miller from the distribution, and correct the account accordingly.

DANIEL ROTHERMEL v. JOHN MEYERLE.

APPEAL BY PLAINTIFF FROM THE COURT OF COMMON PLEAS
OF BERKS COUNTY.

Argued March 6, 1890—Decided October 6, 1890.

[To be reported.]

(a) The act of April 8, 1861, P. L. 258, prohibits, under penalty, the buying, as a hawker or peddler, within the counties of Berks and Franklin, of any butter, eggs, etc., with intent to send the same for sale or barter to any other market out of said counties, without payment of a license fee of \$10 for residents, and \$20 for non-residents of the counties:

1. Said act is not invalid as making discriminations against citizens of other states and in favor of citizens of Pennsylvania; its discriminations are solely against non-residents of the counties named and markets outside thereof, and § 2, article IV. of the federal constitution has nothing to do with distinctions founded on domicile merely.
2. No state has power to make any law which will affect free and unrestrained intercourse and trade between the states, and a state statute imposing imposts or duties upon goods imported into or exported out of the particular state, is in violation of the constitution of the United States and therefore void.
3. But the act of 1861 cannot be regarded as laying a tax or impost upon exports from the state, under a principle analogous to that of *Brown v. Maryland*, 12 Wheat. 425; at most it could be no more than a taxing of goods at the time of their purchase, and they remain liable to taxation until transportation to another state is actually commenced: Per Mr Justice CLARK.

Case Stated.

4. At all events, and even if said act of 1861 be invalid, under the interstate commerce clauses of the United States constitution, in the case of the purchase of goods for sale in a market in another state, it is a valid and proper exercise of power as respects persons residing and doing business wholly within this state.
5. If a part of a statute which is unconstitutional in its operation, is independent of and readily separable from that which is constitutional, so that the latter may stand by itself, the part that is constitutional may be sustained and enforced, even though the unconstitutional provisions be contained in the same section of the statute.
6. The fourteenth amendment to the federal constitution, forbidding any state "to deny to any person within its jurisdiction the equal protection of the laws," did not execute itself so as to repeal, *proprio vigore*, state laws in existence at the time of its adoption, and it cannot be held to have repealed or in any way affected said act of 1861.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS, McCOLLUM and MITCHELL, JJ.

No. 310 January Term 1890, Sup. Ct.; court below, No. 74 November Term 1889, C. P.

To the number and term in the court below, there was entered, by appeal of the defendant from the judgment of a justice of the peace, an action brought by Daniel Rothermel, suing for himself as well as for the commonwealth, against John Meyerle, to recover the penalty of \$100, imposed by the act of April 8, 1861, P. L. 258.

The said act is entitled "An Act relative to hucksters in the counties of Berks and Franklin," and provides that "no person or persons shall buy, or barter for, within the limits of the counties of Berks and Franklin, as a hawker or peddler, any butter, eggs, dried fruit, veal, or other article of produce, with intent to send the same for sale or barter to any other market out of the said counties, without first obtaining a license so to do, and paying therefor," to the county treasurer, the sum of \$20, if residing outside the limits of said counties, or \$10 if residing within said limits; and that any person engaging in huckstering within said counties, without having obtained such license, shall forfeit \$100, to be recovered in a *qui tam* action, etc.

On February 3, 1890, by agreement filed, the following case was stated for the opinion of the court:

"John Meyerle, the defendant, is a resident of Montgomery

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county. He came to Berks county in 1889 and bought, within said county, as a huckster or peddler, articles of produce with the intent to send the same for sale to Montgomery county and Philadelphia, without having obtained a license so to do, as required by the act of April 8, 1861, entitled 'An Act relative to hucksters in the counties of Berks and Franklin.'

"The present action is a suit regularly prosecuted for the recovery of the penalty of \$100, provided for in the second section of said act of 1861. The plaintiff claims that the defendant is liable, under the terms of the act of 1861, for the \$100, and the defendant claims that the act of 1861 is unconstitutional and void.

"If the court be of the opinion that said act is valid and operative, then judgment to be entered for the plaintiff for \$100; but if the court be not of that opinion, then judgment to be entered for the defendant. Costs to follow judgment; either party reserving the right of appeal."

After argument, the court, ENDLICH, J., entered judgment for the defendant, filing the following opinion:

Defendant in this case has suffered judgment before an alderman, for the penalty inflicted by the act of April 8, 1861, P. L. 258, and has appealed to this court. The parties have agreed upon a case stated, turning upon the single question of the constitutionality of the act, and have submitted the same to the court for its opinion and judgment.

This court has expressed its opinion upon that question in the recent decision of *Rothermel v. Ziegler*, C. P. No. 59 November Term 1889, and its views, there stated, have undergone no modification. As supplementing, however, the discussion of the distinction there drawn between discriminations based upon citizenship and those based upon residence merely, in their relation to article IV., § 2, of the federal constitution, a more detailed reference to a few authorities may here be added.

It was held in *Conner v. Elliott*, 18 How. 591, that the privileges and immunities secured by that provision are those only which grow out of citizenship. As was said by Mr. Justice MILLER, in the *Slaughter-House Cases*, 16 Wall. 36, adopting the language of Mr. Justice WASHINGTON, in *Corfield v. Corryell*, 4 Wash. C. C. 371: "We feel no hesitation in confining

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these expressions to those privileges and immunities which are in their nature fundamental,"—rights belonging to an individual as a citizen of the state. And it was said by Mr. Justice GRIER, in *Parker v. Overman*, 18 How. 137: "Citizenship and residence are not synonymous terms;" and by Mr. Justice HARLAN, in *Robertson v. Cease*, 97 U. S. 648: "Citizenship and residence, as often declared by this court, are not synonymous terms." To the same effect are *Grace v. Insurance Co.*, 109 U. S. 278, and *Menard v. Goggan*, 121 U. S. 253.

For the reasons given in *Rothermel v. Ziegler*, *supra*, the court reasserts its opinion that the act of 1861 is unconstitutional and void, but desires it to be distinctly understood that those reasons are not based upon the discrimination made by the act, as affected by article IV., § 2, or the fourteenth amendment, or by the commercial clauses, but solely upon the ground that the necessary operation of the act violates the latter by prohibiting, except under certain indirect but substantial burdens and restrictions, the removal of products of the county of Berks, etc., to markets in other states and countries. It is the effect of a legislative provision that determines its constitutionality or unconstitutionality: *Penna. R. Co. v. Riblet*, 66 Pa. 164, 169. . . . Judgment is entered for defendant.

—The opinion in *Rothermel v. Ziegler*, referred to in the foregoing opinion, was in part as follows:

The statute in question having been passed in 1861, in violation of no provision of the then constitution of this state, is equally unaffected by anything contained in that of 1874: See *Indiana Co. v. Agriculture Soc.*, 85 Pa. 357; *Allegheny Co. v. Gibson*, 90 Pa. 397. It is, however, claimed that the statute offends against the constitution of the United States, article IV., § 2, and against article XIV. of the amendments to said constitution.

Article IV., § 2, provides that the "citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

The attention of the court has been called to the decision in *Groh v. Commonwealth*, 6 Pa. C. C. R. 130, in which an act entirely similar to the one under discussion was, by reference to this provision of the constitution, held void as against citizens of other states. With the utmost respect for the opinion

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of the learned judge who rendered that decision, this court is constrained to differ with this view. The clause of the constitution in question requires only that a citizen of another state be accorded the same rights under our laws as the citizens of Pennsylvania: *Lemon v. State*, 20 N. Y. 562, 608. It has nothing to do with distinctions founded on residence: *Ibid*.

A native born citizen of Pennsylvania, residing out of the state or even out of the counties of Berks and Franklin, is given no rights by this act which are denied to a citizen of another state, and the latter, if residing in these counties, has all the rights under it which a citizen of Pennsylvania has. Neither a native born citizen of Pennsylvania, residing out of the state, nor a citizen of another state not residing in Pennsylvania, can claim any rights, which under our laws belong only to residents of the state: *Lemon v. State*, *supra*. Thus, a statute of a state requiring non-resident suitors to give security for costs, does not offend against the constitutional provision referred to, because relating only to residence and not to citizenship: *Cummins v. Wingo* (S. C.), 10 S. E. Rep. 107.

Nor does article IV., § 2, protect citizens of this state from discriminating legislation within the state: *Slaughter-House Cases*, 16 Wall. 36, 75-77.

The fourteenth amendment, § 1, forbids every state "to deny any person within its jurisdiction the equal protection of the laws." Whilst the purpose sought to be accomplished by this provision has been held to be, "that all persons should be equally entitled to pursue their happiness and acquire and enjoy property:" *Barbier v. Connolly*, 113 U. S. 27, 31, it has also been held that the fourteenth amendment, as, indeed, is shown by the provision made in its fifth section, did not execute itself: *Griffin's Case*, *Chase's Decisions*, 364. It cannot, therefore, be held to have repealed, of itself, the act of April 8, 1861, under which this judgment was entered: See *Lehigh Iron Co. v. Lower Macungie Tp.*, 81 Pa. 482; *Allegheny Co. v. Gibson*, *supra*. Nor has the court been referred to, or been able to find, any decision in which such retrospective and self-executing efficacy was ascribed to that amendment. It simply established a principle, which congress was left to enforce by legislation, and which no state legislature would, after the adoption of the amendment, be at liberty to disregard or violate.

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The act of Congress of May 31, 1870, c. 114, § 16, U. S. Rev. St., § 1977, obviously affords no aid in the present case. Article 1, however, of the United States constitution, provides § 8, cl. 4, that congress shall have power "to regulate commerce with foreign nations and among the several states;" and in § 10, cl. 2, that "no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports."

The act of 1861 does not, it is true, undertake to do the one or the other directly and in terms; but it imposes a license tax upon persons, or perhaps upon the business and occupation of persons, who may buy certain commodities in the counties of Berks and Franklin with intent to send the same for sale or barter to "any other market out of the said counties." This certainly includes a market outside of the state, or a foreign market, and, as will hereafter appear, cannot be limited to markets within the state. Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced: *The Daniel Ball*, 10 Wall. 557. The nature of the commodities referred to specially cannot be deemed to limit the comprehensiveness of the phrase used in the act. With the facilities afforded at the present day, nearly everything is or may be made the subject of inter-state and foreign commerce. A state law imposing a toll upon logs floated into an adjoining state: *Carson Riv. Lumb. Co. v. Patterson*, 33 Cal. 334; punishing transportation of merchandise out of the state: *State v. Saunders*, 19 Kan. 127 (27 Am. Rep. 98), has been held unconstitutional; but it has also been decided that, "where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised strictly from the goods, or indirectly from them through the license to the dealer; but if such tax conflicts with any power vested in congress by the constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license:" *Welton v. Missouri*, 91 U. S. 275, 278; *Walling v. Michigan*, 116 U. S. 146, 461.

It would appear that the license exacted by the act of 1861, must, under this view, be held, in so far as the articles may be intended to be taken to markets in other states or to foreign

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markets, to be a tax directly upon the goods, and upon their removal either to other states or for export; in a word, a regulation of inter-state commerce in the one case, an impost upon exports in the other, a violation of the constitution in either. It is true, a state may pass laws upon avocations and employments pursued in the state, not strictly connected with foreign or inter-state commerce: *Robbins v. Taxing Dist.*, 120 U. S. 489, 494; but, in this case, the avocation or employment assumed by the act and legislated upon is directly connected with inter-state and foreign commerce, and so far as the goods bought are intended for such, it is a regulation bound to affect each.

Nor can it be claimed that a regulation, such as this, properly falls within the reserved police power of the state. No doubt the establishment of a general license system may be regarded as coming within that power: *License Cases*, 5 How. 504, 595. But it is said in *Railroad Co. v. Husen*, 95 U. S. 465, that "what that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety." It would require no little ingenuity to bring this act within any of these categories. Its obvious purpose was to keep home products for the home market. "But, whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to congress by the federal constitution:" *Railroad Co. v. Husen*, *supra*. In the case of the present statute, the encroachment upon the power delegated to congress is, no doubt, trifling. But the principle involved in prohibiting, except under certain burdens and penalties, the removal of the products of Berks county to a market outside of the state, would be equally involved in an attempt of the legislature to exact payment from any of the great manufacturing interests in the state, for the privilege of carrying their products into inter-state or foreign commerce.

So far, then, as the act of 1861 operates to affect inter-state or foreign commerce, it is obnoxious to the objection of unconstitutionality. But if this feature can be severed from it, it is the duty of the court to uphold that which is lawful, the question of partial or entire unconstitutionality depending upon a consideration of the law, and in what manner and to what extent the unconstitutional portion affects the remainder: *Cooley*

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on Const. Lim., 5th ed., 211-212, and cases there cited. The main object of the law, in this instance, obviously was to prevent, except under certain restrictions, impositions and penalties, the removal of certain products of the counties named to markets without their limits, irrespectively as to their destination beyond the county lines, or beyond the borders of the state, or out of the country; and the secondary object was, to discriminate between resident and non-resident hucksters. There is no other object manifest in the act. It must be remembered that the act of April 9, 1856, P. L. 278, has established general regulations as to hucksters in Berks county and forbidden any person under a penalty of \$50 to buy, or exchange, or barter, any kind of goods or groceries whatever for marketable produce, with intention of selling the same, without first obtaining a license. And the supplement to this act, passed April 18, 1856, P. L. 413, directed that hucksters were to be classified and rated, and to pay license fees, as wholesale dealers and retailers. The general subject of buying, etc., with the intent of re-selling, was thus already provided for by enactments which made no discrimination between residents and non-residents, nor between an intent to re-sell in the county and an intent to re-sell out of the county. The single purpose of the act of 1861 must consequently have been to provide for these particular matters.

If the purpose of an act is "to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion:" Cooley on Const. Lim., 213. This principle might save the statute, so far as goods not intended for removal beyond the state are concerned, if its main purpose could be said to be, for instance, the raising of revenue, or the regulation of huckstering in general, in these counties. Instances of this kind are to be found in *Tiernan v. Rinker*, 102 U. S. 123; *Stontenburg v. Hennick*, 129 U. S. 141; *Asher v. Texas*, 128 U. S. 129; *Robbins v. Taxing Dist.*, 120 U. S. 489; *Leloup v. Mobile*, 127 U. S. 648; *United States Exp. Co. v. Hemmingway*, 39 Fed. R. 60; *United States Exp. Co. v. Allen*, 39 Fed. R. 712, and other cases. In each of them, where the act was declared unconstitutional in one aspect only and upheld in others, it will be found that the main intent of the act

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was such as to be preserved and capable of being sufficiently effected by what remained; that the main intent of the act did not interfere with any power delegated to congress, and did not essentially connect itself with, or depend for its execution upon, the effect of the provisions or operation declared unconstitutional. No such features are presented in this case. By eliminating the unconstitutional operation of the restrictions imposed by the act of 1861, the whole design and purpose of the same are rendered abortive.

Again, the doctrine that an act may be unconstitutional and void in part, or in one aspect, and yet be sustained in another, has no room where "it cannot be presumed that the legislature would have passed the one without the other:" Cooley on Const. Lim., 212. It certainly cannot be assumed that the legislature would have passed an act requiring a license to be taken out by one who bought goods in Berks county, which he intended to sell in Lancaster county, while permitting another, unlicensed, to buy the same class of goods in the same county, to be sold in New York or Liverpool. To give this effect to the present act would be to make a new law. And this same consideration forbids the court to construe the phrase "any other market" as limited to any other market in the state, by an application to the language of the act under discussion of the principle, that, where the terms of a statute permit of two constructions, the one making it unconstitutional and the other bringing it within the constitutional limitations, the latter is to be adopted: *Commonwealth v. Bennett*, 16 S. & R. 248; *Presser v. Illinois*, 116 U. S. 252, 269. For, that principle does not warrant the avoidance of unconstitutionality in a statute by forcing upon its language a meaning, which, upon a fair test is repugnant to it: *French v. Teschemaker*, 24 Cal. 515; *Bishop on Written Laws*, § 90. Where the language will not fairly bear a construction consistent with the constitution, the court can only refuse to enforce the act: *Attorney General v. Eau Claire*, 37 Wis. 400.

The conclusion is, that the act of April 8, 1861, P. L. 258, is unconstitutional and void. Nor does this conclusion conflict with the decision of the Supreme Court of this state in *Commonwealth v. Shaffer*, 128 Pa. 575. The only objection made to the act there under discussion and entirely similar to that

Arguments.

of 1861, was that the discrimination between residents and non-residents violated article IV. § 2 of the United States constitution. Without deciding whether or not this position was tenable, the Supreme Court held that the defect, if it was one, was cured by a later act removing the discrimination, and the validity of the act, as amended, not being further disputed by the defendant, the Supreme Court passed upon no other question.

Judgment having been entered for the defendant, the plaintiff took this appeal, specifying that the court erred :

2. In entering judgment for the defendant.
3. In not entering judgment for the plaintiff for \$100.

Mr. Jefferson Snyder (with him *Mr. J. H. Rothermel*, *Mr. David Levan* and *Mr. A. H. Rothermel*), for the appellant :

1. The manifest intention of the act of April 8, 1861, P. L. 258, was not so much to prevent the carrying of farm produce from the county, as to prevent the traveling over the county of persons who for all practical purposes were hawkers and peddlers. It is manifest from the many statutes on the subject that the legislature of this state has considered it essential to the well-being of the people that restrictions should be placed upon the practice of traveling about by persons engaged in buying and selling. Every state in the union has such laws, and they come within the police powers of the state of which Mr Justice FIELD speaks, in *Bowman v. Railway Co.*, 125 U. S. 503. It is perhaps unnecessary to add anything to what the court below has said in answer to the proposition that the act of 1861 is avoided by the fourteenth amendment to the federal constitution. Judged by late decisions of the Supreme Court of the United States, it does not violate that amendment : *Barbier v. Connolly*, 113 U. S. 27 ; *Soon Hing v. Crowley*, 113 U. S. 703 ; *Missouri etc. Ry. Co. v. Humes*, 115 U. S. 512 ; *Missouri etc. Ry. Co. v. Mackey*, 127 U. S. 205 ; *Minneapolis etc. Ry. Co. v. Beckwith*, 129 U. S. 26.

2. Does the statute violate the first article of the constitution of the United States by interfering with inter-state commerce or seeking to impose a tax upon exports ? We do not concede that it is an attempt to regulate inter-state commerce,

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or to lay a duty on exports. It does not impose a tax because the farm produce is carried out of the state, but it imposes it on the man who, as a huckster, goes about to buy up produce, with intent to sell beyond the county lines. That he may choose to carry the goods still farther, and take them into another state, does not seem to affect the question. If, under the principle of *Welton v. Missouri*, 91 U. S. 275, this license tax is a tax upon the goods themselves, it is levied at a time when they are still a part of the general property of the state, and they are liable to taxation until actually started in a course of transportation to another state: *Welton v. Missouri*, supra; *Coe v. Errol*, 116 U. S. 517. Mere intent to export, which is the only thing that may connect the goods referred to in our statute with inter-state commerce, is not enough to take them out of the operation of the taxing power: *Kidd v. Pearson*, 128 U. S. 24.

3. But, conceding that the statute is invalid, as a regulation of inter-state commerce, in so far as it may apply to a huckster who buys for the purpose of selling again in another state, the only consequence is that the act cannot be enforced against such a party. The defendant is not protected by the constitutional limitation, because he is not engaged in inter-state commerce. The commerce he is engaged in is wholly within the state, and the act is valid as to it: *State Freight Tax*, 15 Wall. 232; *Fargo v. Michigan*, 121 U. S. 241; *Wabash etc. Ry. Co. v. Illinois*, 118 U. S. 557; *Robbins v. Taxing District*, 120 U. S. 489; *Leloup v. Mobile*, 127 U. S. 648. The court, by narrowing the purpose of the statute, and imputing to the legislature the bare intent to restrain the exportation of farm produce, reached the conclusion that, as the main purpose of the act fails, because of unconstitutionality, the whole act must fail. But the rule is clearly otherwise in cases of this character. The statute is simply inoperative as to the objects withdrawn from state control, and as to everything else it is valid.

Mr. Edwin Sassaman (with him *Mr. Aug. S. Sassaman*), for the appellee :

1. The natural and obvious meaning of the phraseology, "any other market out of said counties," in the act of 1861, includes markets outside the state, and this natural meaning

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cannot be ignored in order to avoid the consequence of unconstitutionality: *Robbins v. Taxing District*, 120 U. S. 489. The language of the act being plain, there is no room for construction by the courts: *Endlich on Statutes*, §§ 4, 27. The regulation of the act of 1861 cannot be brought under the police power of the state, in analogy to the decision in *Commonwealth v. Brinton*, 132 Pa. 69, upon the acts relating to hawkers and peddlers. There is a definitely established legislative distinction between hawkers and peddlers, on the one hand, and hucksters on the other, there being separate and distinct sets of statutes for the regulation of these two classes of traders respectively, and this distinction the courts must regard: *Bourguignon B. Ass'n v. Commonwealth*, 98 Pa. 54; *Endlich on Statutes*, §§ 365, 367. There is also an essential natural distinction between them.

2. There is no legislative policy directed against hucksters, and no act relating to huckstering puts itself on any such ground as those relating to peddling recite. The acts relative to the former are trade regulations, and, when they restrict the removal of goods beyond the county, they necessarily affect inter-state trade, which cannot be taxed at all by a state even though the same amount of tax be laid on domestic commerce: *Robbins v. Taxing District*, 120 U. S. 489. There can have been but one purpose in the act of 1861, viz., the discouragement of the removal of Berks county products out of the county, as the subject of persons traveling about to buy up provisions was already regulated by the act of April 18, 1856, P. L. 413, and the only change in the system made by the act of 1861 was to increase the fees to be exacted from hucksters re-selling out of the county, incidentally discriminating against non-residents. Such discrimination renders it void: *Groh v. Commonwealth*, 6 Pa. C. C. R. 131; *Ward v. Maryland*, 12 Wall. 418; *United States v. Cruikshank*, 92 U. S. 554; *Barbier v. Connolly*, 113 U. S. 31; *Soon Hing v. Crowley*, 113 U. S. 709; *Railway Co. v. Humes*, 115 U. S. 523; *Powel v. Commonwealth*, 127 U. S. 684.

3. The act is void for violation of the commerce clauses of the United States constitution. When a huckster, whose business is selling at markets in another state, buys up articles of produce, the moment he acquires possession of them they are

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started upon their journey and become articles of inter-state commerce. He himself is a carrier to the outside market. But, even if this were not so, the fact remains that the license exacted is a tax upon an occupation directly connected with inter-state commerce: *Robbins v. Taxing District*, *supra*. The decisions of the United States Supreme Court, cited by the appellant, are inapplicable to the present case, in view of the object of this statute. As pointed out by the court below, if the unconstitutional feature of the act be eliminated from it, its whole design and purpose are rendered abortive, and in such a case the whole act must be held void: *Cooley on Const. Lim.*, 212, 213; *Endlich on Stat.*, § 538. The cases relied on by the appellant recognize and enforce this principle, and, instead of convicting the court below of error, they sustain the distinctions upon which its judgment is based.

OPINION, MR. JUSTICE CLARK:

The defendant was a resident of Montgomery county, and, for anything that appears, was a citizen of this state. He was, in the year 1889, a huckster or peddler, and, in the pursuit of his business, bought articles of produce in Berks county, with the purpose of shipping the same for sale in Montgomery county and in the city of Philadelphia. His residence and his business being wholly confined to the state of Pennsylvania, he cannot, of course, be said to have been engaged in inter-state commerce. But it is contended that as the act of April 8, 1861, P. L. 258, applies as well to the sale or barter, in such articles of country produce, in the markets of other states, as in the markets of this state outside of Berks county, and imposes a penalty for violation of its provisions, it is wholly unconstitutional and void, and imposes no obligation even upon those not engaged in inter-state commerce.

Article 1, § 8, cl. 4, of the constitution of the United States, provides that congress shall have power "to regulate commerce with foreign nations, and among the several states," and § 10, cl. 2, of the same article, "that no state shall, without the consent of congress, lay any imposts or duties on imports or exports." As the "imports" and "exports" mentioned in the latter clause quoted, have reference only to goods brought from or carried to foreign countries, and not to goods transported

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from one state to another: *Woodruff v. Parham*, 8 Wall. 123; *Brown v. Houston*, 114 U. S. 622, no question can arise as to their application to this case. The articles mentioned in the act are "butter, eggs, dried fruit, veal, or other article of produce." As the commodities particularly intended are specified, any "other article of produce" would be restricted to articles ejusdem generis. It is scarcely reasonable to suppose that purchases for exportation from the country were in the mind of the legislature. But the power to regulate commerce among the several states is granted to congress in terms as absolute as is the power to regulate commerce with foreign nations, and that power is exclusive whenever the matter is national, or admits of a uniform system or plan of regulation. No state has power to make any law which will affect the free and unrestricted intercourse and trade between the states: *Brown v. Houston*, supra.

In *Welton v. Missouri*, 91 U. S. 275, it was held that a license tax required for the sale of goods is, in effect, a tax upon the goods themselves. "If such a tax," says the court in that case, "be within the power of the state to levy, it matters not whether it be raised directly from the goods, or indirectly from them, through the license to the dealer; but, if such tax conflicts with any power vested in congress by the constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license." In *Brown v. Maryland*, 12 Wheat. 425, 444, it was sought to impose a license tax upon an importer of foreign goods, and it was held that the exaction of a license tax from the importer was simply the imposition of a tax on the goods imported, and that a state tax, to this effect, was in conflict with the commerce clauses of the constitution. A tax on the occupation of an importer, as it must add to the price of the article to be paid by the consumer, or by the importer himself, in like manner as a direct duty, was held to be the same as a tax on importation. Upon the reasoning of these and other cases, the appellee's contention is that the exaction of a license fee, under the act of 1861, may in the same sense be regarded as a tax upon the property purchased by the huckster, and, as respects goods transported into other states, as an impost on the goods exported. We cannot see how this contention can be sustained. The license fee, at

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the best, could only be treated as a tax on the goods at the time of the purchase, and they were then part of the general mass of property within the state liable to taxation, and so remained until the goods began to move as an article of trade from one state to another, at which time commerce in that commodity may be said to commence: *The Daniel Ball*, 10 Wall. 557. A commodity cannot be said to move as an article of trade from one state to another, until the business of transportation is actually commenced. It does not cease to be part of the general mass of property of the state, subject, as such, to its jurisdiction and to taxation in the usual way, until it has been shipped or entered with a common carrier for transportation to another state, or has been started upon such transportation on a continuous route or journey. Hence logs cut and hauled to the place where they were to be floated to another state, but kept in that place until it was convenient to float them away, were not yet commodities of inter-state commerce, but were taxable: *Coe v. Errol*, 116 U. S. 517. Even articles of import, as soon as the importer has so acted upon them that they become mixed in the general mass of property, are in like manner liable to taxation. If the commerce clauses of the constitution cover such a case as this, under the act of 1861, then it would seem that any statute, imposing a license or other tax upon any mercantile, manufacturing, or other business pursuit, would be without authority of law and void, for the persons thus taxed may carry these pursuits into inter-state commerce.

Of course, no state can, by taxation, or otherwise, discriminate against the citizens of other states, and in favor of its own citizens, as to the business carried on by them in the state. Article IV., § 2 of the federal constitution, provides that citizens of each state are entitled to all the privileges and immunities of citizens of the several states: citizens of other states, therefore, must be accorded the same rights, under our laws, as the citizens of Pennsylvania. But the discrimination contained in the act of 1861 is not against citizens of other states more than citizens of our own state, nor against foreign markets more than domestic markets; it is directed, not against citizens of other states, but against non-residents of the county of Berks, and against markets outside of that county. Article IV., § 2 of the constitution of the United States has noth-

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ing to do with the distinctions founded on domicile, merely : *Lemmon v. People*, 20 N. Y. 608, and hence it is that non-resident suitors may be required to give bail for costs, when persons residing in the state are not so required, etc. As to the purpose and effect of the section referred to, see *Singer Mfg. Co. v. Wright*, 33 Fed. R. 121 ; *Machine Co. v. Gage*, 100 U. S. 676 ; 11 Amer. & Eng. Encyc. of Law, 548, and cases there cited.

But, even if the act of 1861 might, in the case of a purchase of goods for sale in the markets of another state, be deemed obnoxious to the inter-state commerce clauses of the constitution, we are of opinion that no question of inter-state commerce is involved in this particular case. The defendant's employment, as we have said, was one pursued exclusively within the state, and it is conceded that the state has power to pass laws imposing taxes upon avocations in no way connected with inter-state or foreign commerce. As respects persons pursuing this employment wholly within the state, however it may be in other cases, it was certainly a valid and proper exercise of legislative power. A statute may be void only so far as its provisions are repugnant to the constitution : one provision may be void, and this will not affect other provisions of the statute. If the part which is unconstitutional in its operation, is independent of, and readily separable from that which is constitutional, so that the latter may stand by itself, as the reasonable and proper expression of the legislative will, it may be sustained as such ; but, if the part which is void is vital to the whole, or the other provisions are so dependent upon it, and so connected with it, that it may be presumed the legislature would not have passed one without the other, the whole statute is void : *Gibbons v. Ogden*, 9 Wheat. 203 ; *City of New York v. Miln*, 11 Pet. 102 ; *Packet Co. v. Keokuk*, 95 U. S. 80 ; *Tiernan v. Rinker*, 102 U. S. 123 ; *Presser v. Illinois*, 116 U. S. 252 ; *Lea v. Bumm*, 83 Pa. 237 ; *In re Ruan St.*, 132 Pa. 257 ; *Sedg., St. & Const. Law*, 413. The constitutional and the unconstitutional provisions may even be contained in the same section of the law, and yet be perfectly distinct and separable, so that the former may stand though the latter fall : the question is, whether the several provisions are essentially and inseparably connected in substance : *Hagerstown v. Dech-*

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ert, 32 Md. 369; 3 Amer. & Eng. Encyc. of Law, 677, and cases there cited.

Assuming the invalidity of the act of 1861, in so far as in its operation it is supposed to affect inter-state commerce, we are of opinion that the act is valid as to persons residing and doing business wholly within the state. That particular feature of the act, which, in its operation, is alleged to be unconstitutional, is easily and readily separable from that which is valid: the act can stand as well without as with it. The operation and effect of the statute may be restricted to the proper constitutional limits, and the object of the statute attained within these restrictions: at all events, it will not be presumed that the legislature would not have passed the statute to operate within the limitations imposed by the constitution. The real purpose of the act, doubtless, was to keep this kind of products for the home market, but, in view of the proximity of the great city of Philadelphia, and of other markets in eastern Pennsylvania, it is exceedingly probable that the legislature intended that the statute would accomplish its purpose within the bounds of the state.

In *Robbins v. Taxing Dist.*, 120 U. S. 489, a license tax was imposed by the laws of Tennessee upon all drummers, etc., not having a licensed house or business within the taxing district of Shelby county, which, of course, included drummers representing business houses whether in or out of the state of Tennessee: but, as the goods sold by such drummers as represented houses outside of the state were not within the jurisdiction of the state, until, by the act of the importer they should become mixed with the mass of the goods within the state, the Supreme Court of the United States held that, as to this class of drummers, the statute affected inter-state commerce and to that extent was void; yet, not only in the opinion of the court, but in the dissenting opinion also, although the question was not directly involved, the validity of the statute as to drummers representing houses within the state was conceded. "To say that the tax, if invalid as against drummers from other states," says Mr. Justice BRADLEY, in the opinion of the court, "operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument, because the state is not bound to tax its own drummers; and,

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if it does so, whilst having no power to tax those of other states, it acts of its own free will, and is, itself, the author of such discrimination. As before said, the state may tax its own internal commerce; but that does not give it any right to tax inter-state commerce."

Nor, for the reasons stated by the learned judge of the court below, is the act of 1861 affected by the fourteenth amendment. The case turns upon the effect of what may be termed the commerce clause of the constitution; and we are of opinion that the act of 1861 was not in this case violative of these provisions, and that, therefore, judgment should have been entered for the plaintiff.

The judgment is reversed, and judgment is now entered on the case stated, in favor of the plaintiff, for \$100, and costs.

S. BURSON v. FIRE ASS'N OF PHILADELPHIA.

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APPEAL BY DEFENDANT FROM THE COURT OF COMMON PLEAS
OF MONROE COUNTY.

Argued March 10, 1890—Decided October 6, 1890.

[To be reported.]

1. When, after a candid explanation of his title, a person is advised by a representative of an insurance company to insure certain goods, in which he has an interest, in his own name as owner, and acts upon this advice, the company will be estopped from defending on the ground that his interest in the property does not amount to ownership.
- (a) In arranging with the holder of a fire insurance policy for its renewal, the agent of the insurance company said, "I will make you another policy like the first one, only I will make it so that hereafter, if you wish to continue, we will only give you a receipt, do not have to make a new policy for you."
2. The assured had a right to suppose that a policy, afterwards delivered to him under this arrangement, was essentially similar to the original policy; and he was not bound by a warranty clause in it, which he did not know of and which had not been in the first policy: *Susq. Ins. Co. v. Swank*, 102 Pa. 17, distinguished.
3. But a warranty of sole and unconditional ownership is not broken, as to the insurer, by reason of the fact that the assured had made a "lease"

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of the goods insured, which amounted in law to a conditional sale, reserving title until full payment of the consideration; the insurer has no standing to assert that such transaction is a legal fraud.

4. A recovery to the full extent of the policy may be had, in such a case, when the goods insured have been destroyed by fire, although more than half the price to be paid for them under the lease has been received by the assured, as payments to him on account do not transfer the title pro tanto, and he must account for the goods to the conditional vendee.
5. An assignment of error to the admission of testimony, which does not give the offer made, nor the substance of the testimony admitted under it, and does not show any exception sealed, although it quotes the objections made to the admission of the testimony, is not according to the Rule of the Supreme Court, and will not be considered.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and WILLIAMS, JJ.

No. 183 July Term 1889, Sup. Ct.; court below, No. 7 February Term 1886, C. P.

On January 4, 1886, Stroud Burson brought debt against the Fire Association of Philadelphia upon a policy of insurance against fire, issued by the defendant company to the plaintiff. Issue.

At the trial on December 17, 1887, the following facts were shown:

Early in 1881, Simeon Flory, who was the proprietor of a store in Stroudsburg and owned a stock of hardware, tinware and tools therein contained, desired to sell out his stock and business for ready money, and proposed to his brother William S. Flory, who was then in his employ as a clerk or salesman, that the latter should buy him out. William went to Burson, the plaintiff, explained the situation to him, and asked him to advance the money required to make such a purchase. After some consultation, an arrangement was effected and carried out, under which Simeon Flory made a bill of sale to Burson of all the stock of goods, etc., and assigned to him all outstanding book accounts, etc., Burson paying and securing to Simeon the price agreed upon therefor, viz., \$3,320. Burson then made a verbal lease of the goods to William, the terms of which were that William should pay to Burson annually, as a rent upon the goods, a sum equal to the interest upon the purchase money paid by Burson to Simeon, and as much every year on account

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of the principal as he could; should keep up the stock to its then value, and keep the property insured, and, upon payment of the entire principal, he should receive a bill of sale from Burson, the goods to remain the property of Burson and under his control "until the last dollar was paid." The book accounts were turned over by Burson to W. S. Flory, along with the goods, and were afterwards collected by the latter, who used the moneys collected in carrying on the business under the lease and in making payments to Burson.

Immediately after the execution and delivery of the bill of sale from Simeon Flory to Burson, the plaintiff's brother, Lewis M. Burson, accompanied by W. S. Flory, went to the office of T. M. McIlhaney, an agent of the defendant company. It was admitted by the defendant that McIlhaney, as its agent, had full power to receive proposals for insurance against loss or damage by fire on property located in Stroudsburg and vicinity, to issue and countersign policies and renewal receipts furnished by the defendant, to collect premiums and pay the same to the defendant, and to transact such other business as might be entrusted to his care. McIlhaney was dead when this suit was brought.

W. S. Flory testified for the plaintiff, under objection and exception to his competency as a witness, and to the admissibility of the testimony, that McIlhaney was fully informed by Lewis M. Burson and the witness, respecting the transaction between the witness and the plaintiff and the terms of the arrangement made by them, and was then asked what was the proper way of insuring the goods, to which he replied: "In the name of Stroud Burson;" and that in accordance with his suggestion a policy in the sum of \$3,000, for one year, was thereupon taken out in the plaintiff's name. Lewis M. Burson testified, under objection and exception, substantially to the same effect, stating, in addition, that he informed McIlhaney that W. S. Flory, having rented the goods with the privilege of purchasing, would stay in the store as he was there before for Simeon Flory. The policy referred to, which was not the one in suit, was dated February 2, 1881, numbered 82,245, and was countersigned for the defendant company by McIlhaney. It did not contain any warranty as to ownership on the part of the insured. This policy was received in evidence for the plaintiff under objection and exception.

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W. S. Flory testified, also, that a few days before policy 82,245 expired, McIlhaney came to the store, saw the witness, inquired whether it was desired to continue the insurance, and, upon receiving an affirmative reply, said: "I will make you another policy like the first one, only I will make it so that hereafter if you continue, we will only give you a receipt, do not have to make a new policy for you;" that the witness replied: "Anything, so as it is all right;" that McIlhaney then inquired whether the situation between the witness and the plaintiff was the same as when the first policy was made out, and on being informed by the witness that it was, except that a payment had been made to the plaintiff, he said that did not matter; that McIlhaney then made out and handed to the witness a new policy and the witness paid him the premium thereon.

This second policy, which was the one in suit, bore date February 2, 1882, was in the sum of \$3,000, and was in the name of Stroud Burson as the party insured. It contained the following provision:

"This policy shall become void, unless consent in writing is indorsed by the association hereon, in each of the following instances, viz.: If the assured is not the sole and unconditional owner of the property; or, if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, is not truly stated in this policy; or, if any change take place in the title, interest or possession of the property, (except in case of succession by reason of the death of the assured), whether by sale, transfer or conveyance, in whole or in part, or by legal process or judicial decree. . . ."

At the expiration of one year, and for several years thereafter, the policy was renewed by written agreements, all in the same form, the last of which was as follows:

"No. 31,342. Stroudsburg Agency, Feb'y 10, 1885.

"FIRE ASSOCIATION OF PHILADELPHIA.

"RECEIVED from Stroud Burson fifteen dollars, being the premium on three thousand dollars, insured under policy No. 438,809, which is hereby continued in force for one year, to wit: from the 10th day of Feb'y 1885, until the 10th day of Feb'y, 1886, at noon. But this renewal shall not be valid

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until countersigned by Tho. M. McIlhaney, agent of said Fire Association of Philadelphia, at Stroudsburg.

“THO. M. McILHANEY, Agent.

“It being understood and agreed that the terms and conditions upon which said policy was originally predicated shall continue valid and in force, and that there has been no change in the risk since first insured not indorsed on said policy, or otherwise acknowledged by said company in writing.”

For some time after the issuing of this second policy W. S. Flory continued to carry on business at the store in his own name. He then took in a partner and thereafter conducted the business under the name of W. S. Flory & Co. That name was on the sign over the store door, and the purchase of goods for stock, as well as the other transactions connected with the business, were done under it. The plaintiff exercised no control over the business. Payments were made from time to time by Flory to the plaintiff, and on February 8, 1885, when the last settlement was made between them, the balance owing to the plaintiff was \$1,200. On July 19, 1885, a fire destroyed most of the goods insured under the policy.

At the close of the testimony, the court, DREHER, P. J., charged the jury in part as follows :

This contract between plaintiff and defendant was entered into by the plaintiff with the defendant's agent Tho. M. McIlhaney, and it is one of the admissions in this case, that Thomas M. McIlhaney, who countersigned said policy, was at the time the agent of the company, and continued to act as such till the time of his death in December, 1885, with full power to receive proposals for insurance against loss or damage by fire, on property located in Stroudsburg and vicinity, with authority to issue and countersign policies and renewal receipts furnished by said defendant, to assent to assignments and transfer of insurance policies, to collect premiums and pay to the defendant, and to transact such other business as may be intrusted to his care. By that admission, you will notice that Squire McIlhaney was an agent for this defendant company [clothed with more than the usual powers given by insurance companies to what are called local agents.]¹⁸

The relation between this plaintiff and this association, as in-

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sured and insurer, commenced on the second day of February, 1881. A policy was then issued by the defendant to the plaintiff upon this stock of goods, for one year, and at the expiration of that year, or a few days afterwards, there was executed this policy, which the plaintiff has declared upon in his narr. After that, there was no new policy issued, but simply renewal receipts.

The property covered by this policy of insurance was destroyed by fire, as I recollect the evidence, some time in the month of July, 1885. The plaintiff brings his suit now upon this policy, claiming to recover the value of the goods destroyed not exceeding in amount the sum of \$3,000, less the tools and about \$100, part of the tools and the stoves sold for old iron. The defendant resists payment for this property, and has filed a number of pleas, which are simply statements or allegations made by the company in excuse of payment. And the first plea is, that the plaintiff at the time of the fire was not the sole and unconditional owner of the goods burnt, but that the whole or a part of said goods belonged to another party or parties in no way a party to the contract of insurance; and that the interest of the plaintiff in the goods mentioned in the policy, if he had any interest, was not correctly stated to the defendant at the time of the original contract of insurance, nor correctly set forth in the policy; nor was the defendant notified of, and his consent in writing procured to any subsequent change in the title, interest or possession of the goods, as required by the terms of the policy and the renewals thereof; and that, therefore, by the express terms and conditions of the contract, the contract has become and is totally null and void.

If there was nothing else in this case, except as we have it upon the face of this policy, in writing and printing, we would say to you that any change that was made,—if the interest of Stroud Burson was not just what it is represented to be in this policy of insurance, that is, that he was the sole and unconditional owner of it,—if there was nothing else but this written paper, we would say to you that this plaintiff cannot recover. . . . Stroud Burson, we must say to you, was not, when this first insurance was obtained, the sole and unconditional owner of that property; because, the undisputed evidence in the case is, that he had entered into an arrangement or agreement with W. S. Flory, by which he was to allow Flory to have the

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possession of the goods, to use them in his business, with a contract to sell them to him at the price which he, Burson, paid to Simeon Flory for them. . . .

Now you have here the evidence of W. S. Flory and Lewis M. Burson as to what was said to Squire McIlhaney when they went there to get this policy of insurance. And Flory swears that, after they stated what the interest of Stroud Burson was, that McIlhaney said the proper way to insure this property was in the name of Stroud Burson. [Now, we say to you that if Flory and Lewis M. Burson truly represented to Squire McIlhaney the relation that Stroud Burson sustained towards this property, or his interest in it—that is to say, that he had purchased it of Simeon Flory and had agreed to sell it to W. S. Flory for the same amount of money he had paid to Simeon, and that W. S. Flory was to pay him the yearly interest on that sum, and was to pay as he could on account of the principal, and that until he had paid the whole amount of money the property should remain, the title should be in Stroud Burson, and under his control, and that Flory was to keep up the stock to what it was when Stroud Burson purchased it, and to keep it insured,—then we say to you, that you should find a verdict in favor of the plaintiff on this first issue raised between the parties.] ¹⁹ If the evidence fails to satisfy you that such statement was made truly as to the title of Stroud Burson, and what they did say was the truth, then we say, you ought to find for the defendant on this first issue.

The second plea of the defendant is, that the policy of insurance was made, and renewed from time to time, upon condition and warranty of plaintiff, that he was the sole and unconditional owner of the property; whereas, he was not the sole and unconditional owner, but the plaintiff had at some time, to the defendant unknown, prior to the fire, to wit, the first of February, 1882, sold the property and transferred the possession to W. S. Flory, or W. S. Flory & Co., without the knowledge and consent of defendant as provided by the terms of the policy, by means whereof the said warranty and condition were broken and the policy became and was null and void. . . . I say here, as I did in relation to the first issue joined between the parties, that there was a warranty by the written stipulations of this policy, and if there was nothing else in the case we would say

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to you, that if there had been any transfer or change in the title, interest or possession of this property, the plaintiff could not recover. But we have permitted the plaintiff to prove what occurred, as we have already stated to you.

Now, you will bear in mind that this allegation made by the plaintiff, that a true statement was made to the agent of the insurance company of his interest in this property and his relation with Flory, was made when the first policy was taken out in 1881. The suit is not on that policy, but it is on one issued in 1882. The first policy provided for an insurance for the term of one year, and also for the full end and term of any future time and times for which a premium of insurance shall be paid and indorsed on this policy or otherwise acknowledged in handwriting by the secretary or other authorized officer. That policy was not renewed by an indorsement on the back of it, but a new policy was issued; and [the question for you to pass upon is, was this policy issued upon the same terms and conditions as the old policy was, and did the agent of the company, Squire McIlhaney, when this new policy was written by him, understand,—was he informed by the plaintiff or Flory as to their then relations with each other and the ownership of this property? because I take it, it is necessary for the plaintiff to show that this new policy was issued upon the statements and representations made by the plaintiff's agent and Mr. Flory at the time the original policy was taken out. The only evidence we have upon this point, that I recollect of, is found in the testimony of Mr. Flory, who says, that at the end of the year Squire McIlhaney came to him in relation to this insurance, whether it was to be renewed, and asked Flory whether there was any change in the relation that he sustained to this property, and Flory told him no, the matter remained as before only that he had made a payment to Burson on account. Now, if that be true, and Squire McIlhaney then, as the agent of this company, filled up this new policy, then we have to say to you, that this new policy is to be considered, as respects the rights of these parties, just as the first policy would have been considered, if a fire had occurred within the year. Now then, if you find that this policy of February 2, 1882, was issued upon the representations, upon the strength of the statements and representations made when the first policy was taken out, and

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you find those statements to be a true statement of what Stroud Burson's interest was, then we say to you, you should find in favor of the plaintiff on this second issue.] ²⁰

The parties have requested us to charge you upon certain points which they have presented to us. The plaintiff asks us to charge:

1. That if Stroud Burson, the plaintiff, held the legal title to the property insured and had an interest in the same, he had an insurable interest and was the owner of the said property.

Answer: That proposition I affirm.

3. If the jury believe that at the time the policy of insurance was made, on which the suit was brought, Tho. M. McIlhaney, the agent of the defendant, was informed by the plaintiff that he had purchased the goods insured in said policy of Simeon Flory, and that he had entered into a verbal agreement with W. S. Flory for the sale to him of said property, and that by said agreement the goods were to remain in the possession of said W. S. Flory, and that he was to have the use of said goods in his business and to pay for such use an annual rent equal to the interest on the amount paid by plaintiff when he purchased of Simeon Flory, and also to keep the same insured, and to keep the amount of said stock of goods up to what it was when the said plaintiff bought the same, and that when the last dollar of the purchase money was paid to the said plaintiff he was to make out and deliver to the said W. S. Flory a bill of sale for the same, but that until the whole sum aforesaid was paid the said personal property was to remain the property of said plaintiff, and that said plaintiff further informed the said Tho. M. McIlhaney, agent of said defendant, that W. S. Flory had made a payment to the plaintiff on account of the purchase money aforesaid, then the said defendant is estopped from asserting that the plaintiff was not the sole and unconditional owner of the property insured.

Answer: I have here on my memorandum an affirmance of that point, but I see you refer in the commencement of the point to the policy on which suit is brought. There is no evidence that that was said when this policy was issued. Upon reflection, I shall affirm that point as it stands.⁴

4. That, if at the time the policy in suit was made the defendant's agent knew of his own knowledge or was credibly in-

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formed by the plaintiff of his title or interest in the property insured, and then made out and delivered the policy, omitting therefrom such knowledge or information, then any mistakes therein were the mistakes of the defendant and do not avoid the policy.

Answer: This proposition is affirmed, so far as such knowledge on the part of the agent was gained from information or statements communicated to him by the plaintiff's agent, Lewis M. Burson, or W. S. Flory.⁵

5. That if at the time of the several renewals of the policy the agent knew or was informed of any change which had taken place in regard to the title or interest in the property insured, such renewals were a waiver of the conditions of the policy relative to such changes in title or interest.

Answer: To this proposition I make the same answer as to the one immediately preceding.⁶

6. That if Tho. M. McIlhaney, the agent of the defendant, had full power to receive proposals for insurance against loss by fire, and to issue and countersign policies and renewal receipts furnished him by the said defendant, and to collect and pay the premiums to the defendant, then he was the general agent of the defendant for the purposes aforesaid; and any knowledge or information possessed by him relative to the title or interest of the plaintiff in the property insured, or any act done by him within the scope of his said general agency, such knowledge, information or act was the knowledge, information and act of the defendant.

Answer: This is affirmed only to the extent that such knowledge or information was communicated to the defendant by plaintiff's agent or W. S. Flory.⁷

The defendant has also presented a number of points:

3. Under the contract between Stroud Burson and W. S. Flory, as proved by the undisputed evidence in the case, the said Flory became the owner of the goods in question with respect to the defendant company, and the said plaintiff was not the owner of said goods, and at the time of the fire he had no interest in the same except as between himself and said Flory to the extent of \$1,200, the unpaid purchase money, and the unpaid interest on the same.

Answer: That I cannot affirm.¹³

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4. While such interest to the extent of the unpaid purchase money is an interest which might be insured in a policy properly drawn for that purpose, the terms of the present policy are such that this interest is not thereby insured.

Answer: That I cannot affirm.¹³

6. By the terms of said policy said plaintiff warranted that said policy should become void unless consent in writing should be indorsed by the defendant association upon said policy, if the assured, that is to say, the plaintiff, was not the sole and unconditional owner of the said goods.

Answer: That is correct as the policy reads on its face.¹⁴

7. By the terms of said policy said plaintiff warranted that said policy should become void unless consent in writing should be indorsed by the defendant association upon said policy, if the interest of the assured in the property was not truly stated in said policy.

Answer: I answer this in the same manner as the sixth point.¹⁵

8. By the terms of said policy as continued in force by the several renewal receipts, the said plaintiff was not insured for any greater amount than to the extent of his interest in the property mentioned in the said policy, on February 10, 1885, the date of the last renewal, and if the plaintiff were otherwise entitled to recover at all, he could only recover for the amount of unpaid purchase money and accrued interest as of February 10, 1885, less the value of tools saved from the fire and the amount realized by said Flory from the sale of damaged goods after the fire.

Answer: I answer that in the same manner as I answered the sixth and seventh, that it is correct as the policy reads on its face.¹⁶

9. Under all the pleadings and the evidence in this case the plaintiff cannot recover, and your verdict must be for the defendant.

Answer: That I decline to affirm.¹⁷

I do not think it necessary to say anything further. You will take this case and apply the rules of law as I have stated them, to the evidence or the facts as you find them, and render a verdict accordingly. If you render a verdict for the plaintiff, it will be for an amount of loss [not exceeding \$8,000, with interest],²¹ allowing the defendant credit for the tools that

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were saved and the damaged goods that were sold and something realized for.

The verdict of the jury was in favor of the plaintiff for \$3,028.34. Rules for a new trial and in arrest of judgment having been discharged, judgment was entered on the verdict; whereupon the defendant took this appeal, assigning for error:

1. The admission of the "alleged statements or declarations of Lewis M. Burson and Wm. S. Flory to Tho. M. McIlhaney, the defendant's agent, and the replies of the latter thereto, at the time the first policy of insurance was issued, as set forth in bills of exception on pages 6, 10 and 29 of appendix. The objections to the admission of this evidence were:" (quoting the objections made when the testimony was admitted, but not quoting the offers, the substance of the testimony admitted thereunder, or the bills of exception.)

4-7. The answers to plaintiff's points.^{4 to 7}

12-17. The answers to defendant's points.^{12 to 17}

18-21. The portions of the charge embraced in []^{18 to 21}

Mr. S. Holmes and Mr. Furman Sheppard, for the appellant.

1. Compliance with the warranty that the insured was the sole and unconditional owner of the property, was a condition precedent to any recovery; and testimony was inadmissible to contradict or control it, by showing that the agent of the insurer was informed of the facts which constituted its breach: *State Ins. Co. v. Arthur*, 30 Pa. 331; *Jennings v. Insurance Co.*, 2 Denio 79; *Kennedy v. Insurance Co.*, 10 Barb. 289; *Atherton v. Brown*, 14 Mass. 152; *Wiggin v. Boardman*, 14 Mass. 12; *Flinn v. Tobin*, 1 Mood. & Malk. 367; *DeHahn v. Hartly*, 1 T. R. 343; *Farmers' Ins. & L. Co. v. Snyder*, 16 Wend. 481 (30 Am. Dec. 118); *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72 (22 Am. Dec. 567); *Woolmer v. Muilman*, 1 W. Bl. 427 (3 Burr. 1419); *N. Y. Gas L. Co. v. Insurance Co.*, 2 Hall 108; 1 Phillips on Ins., 284; *Glendale Woolen Co. v. Insurance Co.*, 21 Conn. 19 (54 Am. Dec. 309); *Holmes v. Insurance Co.*, 10 Metc. 211; *Birmingham v. Insurance Co.*, 42 Barb. 457; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331; *Cooper v. Insurance Co.*, 50 Pa. 299. See also *Martin v. Berens*, 67 Pa. 462.

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2. The disclosures alleged to have been made to the agent, respecting Burson's ownership, were misleading. He was deceived by the use of false terms. He was informed that the transaction between Burson and Flory was a lease of the goods, although the law calls it a sale. As respects creditors, and all other third parties dealing with Flory, he was the owner. The goods were undoubtedly liable for his debts, and Burson's ownership was not worth a straw. Nor were all the facts communicated to the agent. He was not told that the arrangement was intended simply to secure a loan to Flory, nor that Flory was going to carry on business in his own name and deal with the goods as his own. On the contrary, the representation was that Flory was to stay in the store in the same way that he had done before, when he was the clerk of his brother. Again; these statements were made in connection with a different policy from the one in suit: there was no evidence that the relations of the parties were explained when this policy was issued, and therefore the court should not have affirmed the plaintiff's third point: *Sartwell v. Wilcox*, 20 Pa. 117; *Evans v. Mengel*, 1 Pa. 68.

3. The alleged understanding that the new policy should be like the old one, will not bear the rigid interpretation given to it by the court. It meant simply that the new policy should be in the same amount, upon the same property, in the same name, for the same premium, for the same term, and issued by the same company. But, at all events, a different form of contract, with a warranty, was made by the acceptance and retention of the policy and the acceptance of the renewals thereof: *Susq. Ins. Co. v. Swank*, 102 Pa. 17; *Parks v. Insurance Co.*, 5 Pick. 36. The answer to the plaintiff's sixth point was in conflict with the express limitations upon the power of the agent, contained in the policy; and in telling the jury, in the general charge, that McIlhaney was clothed with more than the usual powers given to local agents, the court was not sustained by any evidence as to what the usual powers of agents are, disregarded the universal practice of insurance companies, and misled the jury as to the importance to be given to McIlhaney's words and acts. We were entitled to explicit answers to our sixth, seventh and eighth points: *Powers v. McFerran*, 2 S. & R. 44; *Smith v. Thompson*, 2 S. & R. 49; *Geiger v.*

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Welsh, 1 R. 348; Slaymaker v. St. John, 5 W. 27; Carpenter v. Mayer, 5 W. 483; Hood v. Hood, 2 Gr. 229; Penna. R. Co. v. Zebe, 33 Pa. 324. The instructions as to the measure of damages were contradictory, and therefore erroneous: Selin v. Snyder, 11 S. & R. 319.

Mr. J. B. Storm, for the appellee :

Counsel cited: (1) On the subject of warranty, and as to the admission of evidence to establish fraud, mistake of the insurer's agent, or mutual mistake of the parties in the drawing of a policy: State Ins. Co. v. Arthur, 30 Pa. 331; Insurance Co. v. Mahone, 21 Wall. 152; Combs v. Insurance Co., 43 Mo. 148 (97 Am. Dec. 383); Plumb v. Insurance Co., 18 N. Y. 392 (72 Am. Dec. 526); Insurance Co. v. Ives, 56 Ill. 402; Insurance Co. v. Lewis, 30 Mich. 41; Insurance Co. v. McKee, 94 Ill. 494; Insurance Co. v. Fish, 71 Ill. 620; Insurance Co. v. Olmstead, 21 Mich. 246; Insurance Co. v. Eddy, 55 Ill. 213; 2 Wood on F. Ins., 832, 837, 850, 851, 866; May on Insurance, § 143; Van Schoick v. Insurance Co., 68 N. Y. 434; Bidwell v. Insurance Co., 24 N. Y. 302; Smith v. Insurance Co., 89 Pa. 287; Eilenberger v. Insurance Co., 89 Pa. 464; Susq. Ins. Co. v. Cusick, 109 Pa. 157. (2) As to the plaintiff's ownership and insurable interest in the goods: 1 Wood on F. Ins., 643; Manhattan Ins. Co. v. Webster, 59 Pa. 227; Pittsburgh Ins. Co. v. Frazee, 107 Pa. 521.

OPINION, MR. CHIEF JUSTICE PAXSON :

This was an action of debt in the court below upon a policy of fire insurance issued by the appellant company to Stroud Burson upon a stock of merchandise contained in a building in Stroudsburg. The policy was for the sum of \$3,000, and it was not denied that the loss exceeded that amount, nor was it alleged that there was the slightest taint of fraud about the transaction. The defence of the company is purely technical.

Among the warranties and conditions set forth in the policy, and to which the written contract is alleged to be subject, are the following: If the assured is not the sole and unconditional owner of the property; or, if the interest of the assured in the property, whether as owner, trustee, factor, agent, or mortgagee, lessee, or otherwise, is not truly stated in this policy; or,

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if any change take place in the title, interest, or possession of the property, etc., this policy shall become void, unless consent in writing is indorsed by the association hereon. It is proper to say here, that this policy, while not so in form, was practically a renewal of a former policy between the same parties, and covering the same stock of goods, which original policy contained no such condition. Upon this point, the uncontradicted evidence is that Mr. McIlhaney, the agent of the company, called at the store where the insured property was, and asked whether W. S. Flory (who had charge of the insurance) wished to continue the insurance. Mr. Flory replied that he did, whereupon he said: "I will make you another policy like the first one, only I will make it so that hereafter, if you continue, we will only give you a receipt, do not have to make a new policy for you." The only object of this change, apparently, was to enable the insurance to be renewed thereafter by receipt, instead of issuing a new policy for each renewal. It may well be questioned, under this state of facts, whether there was really any change in the conditions of insurance. It would certainly have been proper for the agent, when he proposed to give the assured a new policy "like the first one," to have informed him of any change of importance in the conditions. The assured had a right to suppose there was no essential difference between the policies, and the case does not come within the ruling in *Susq. Ins. Co. v. Swank*, 102 Pa. 17, where it was held that a person who accepts a policy, and retains it for sixteen months, without reading it, cannot, after enjoying its protection during all that time, defend against an assessment upon the ground that the policy was issued upon a different plan from the one which he had verbally requested. We think the learned judge was justified in admitting the first policy in evidence, and in his instructions to the jury thereon.

The principal defence set up by the company was that the assured was not the sole and unconditional owner of the property covered by the policy.

There are certain facts which I understand to be undisputed. They may be briefly stated thus: (a) That there was no written application; (b) that the original policy contained no warranty clause; (c) that the assured had an insurable interest in the property destroyed; and (d) that the property destroyed

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exceeded in value the amount for which it was insured. Nor, was there any dispute about the facts relating to the plaintiff's title, or the manner in which he held the title, and effected the insurance. For convenience, I take them as I find them condensed in the charge of the learned judge: At the time the policy of insurance was made, the plaintiff represented and stated to the defendant's agent that he had purchased the property of Simeon Flory; that he had entered into an agreement with W. S. Flory for the sale of the goods; that by the agreement the goods were to remain in the same place where the defendant had previously insured the same; that W. S. Flory was to have the use of the goods in his business, and pay for such use a rent equal to the annual interest on the amount paid by Stroud Burson for the goods, and also to keep the same insured, and keep up the stock to what it was when the plaintiff bought the same, and when the last dollar of purchase money was paid to the plaintiff he was to make a bill of sale to W. S. Flory, but until the whole sum was paid the goods were to remain the property of the plaintiff, and to be under his control; that the defendant's agent, on this statement of the plaintiff's interest made to him, said the proper way to insure the goods was in the name of the plaintiff; that at the time of making said policy and the several renewals, the agent inquired whether the same original arrangement continued, and was informed by the plaintiff that it did, and that said W. S. Flory had made a payment or payments on the said agreement to the plaintiff; that, the year before, said goods were insured by plaintiff in policy No. 82,245, which expired on February 2, 1882, whereupon the defendant agreed to insure the property for another year in a policy like No. 82,245, with the explanation that thereafter the same was to be continued by renewal receipts; that the interest of the plaintiff in the goods mentioned in the policy was correctly stated to defendant's agent at the time of the original contract of insurance, and, if the same was not correctly set forth in the original policy, such neglect was the act of the defendant; and that there was no subsequent change of title, interest, or possession.

Nor, was there any dispute as to Thomas M. McIlhane having been the agent of the defendant company, with power to act for said company in Stroudsburg and vicinity, in receiving

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proposals for insurance, issuing and countersigning policies, assenting to assignments, collecting premiums, etc. It is true, the statement of the learned judge that the said agent was "clothed with more than the usual powers given by insurance companies to what are called local agents" was not only criticised by the learned counsel for the company, but was assigned as error: See eighteenth assignment. But if we concede that the power of the agent was too strongly stated by the court, Mr. McIlhaney had ample authority to bind the defendant. For the purposes of this case, we must consider Mr. McIlhaney as the company.

We have, then, the case of a person who goes to the company, and fully and candidly explains the condition of his title, and is informed by its officers or its agent, it matters not which, that the proper way to insure his property is in his own name, as owner. He takes out his insurance in the manner he was advised; pays the premium on it for years, and then, after his property is destroyed by fire, he is confronted by a clause in his policy requiring him to be the sole and unconditional owner of the property; a clause which was not contained in his first policy, and which he had no reason to suppose was in the policy which had been substituted for it, and which he was told by the agent was to be "like the other." Surely, if such a defence is to prevail, insurance has ceased to be an indemnity.

I am, however, unable to see why the plaintiff was not the sole and unconditional owner of the property insured, within the meaning of the policy. The evidence is not disputed that the entire legal title to it was in the plaintiff at the time the insurance was effected, and that by the very terms of the lease or bill of sale, by whatever name it may be called, from the plaintiff to Flory, it was stipulated that the ownership should remain in the plaintiff until the last dollar was paid. It was urged, however, by the company that this transaction was a legal fraud, with the effect of making the property liable to execution on the part of the creditors of Flory; in other words, that Flory was the real owner of the property, while the plaintiff only held a bill of sale, unaccompanied by possession, and therefore worthless in law. Upon this theory the defence has been principally constructed. That it will not bear examination is apparent. The insurance company is not a creditor of Flory. It has no

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standing to assert that the transaction is a legal fraud. It is good between the parties; it is good against all the world, except creditors of Flory, if there be any, intended to be defrauded. As between the plaintiff and Flory, and as between the plaintiff and the insurance company, the title was in the plaintiff. The fact that Flory had made payments on account to the plaintiff did not give title *pro tanto* to Flory. This is because they had agreed that it should not; that until the last dollar was paid the title was to remain in the plaintiff. In the mean time the goods remained the property of the plaintiff, and when destroyed by fire the loss was his. He must hand over the goods to Flory when the last payment is made, or if that is not possible, owing to their destruction, he must return him the money he has paid. The contract between the plaintiff and Flory must be executed as they made it, so long as it is not interfered with by some one who has the right to call its validity in question. I have endeavored to show that the defendant company has no such right. In this view of the case, we do not think it was error to instruct the jury that they might find a verdict not exceeding the amount of the policy \$3,000. See the twenty-first assignment. It is true this instruction is inconsistent with that contained in the answer to the defendant's eighth point, but, as no possible injury could have resulted to the defendant therefrom, we forbear further comment.

The first assignment alleges error in the admission of the testimony of Lewis M. Burson and W. S. Flory as to conversations with Thomas M. McIlhaney, the agent, at the time the insurance was effected. The ground of the objection was that the agent was dead, and the witness on the stand, W. S. Flory, was a party in interest. It is a sufficient answer to this assignment to say that it does not conform to the rules. Fortunately, in this instance, the omission has not prejudiced the defendant's case.

I notice nothing in the remaining assignments that is not covered by what has already been said.

Judgment affirmed.

Statement of Facts.

JOHN EYERMAN v. J. J. DETWILLER ET AL.

APPEAL BY PLAINTIFF FROM THE COURT OF COMMON PLEAS
OF NORTHAMPTON COUNTY.

138 285
145 649

Argued March 11, 1890—Decided October 6, 1890.

[To be reported.]

1. Under § 10, act of April 22, 1856, P. L. 534, when any of the parties in a partition proceeding desires to make a bid for the land, above the valuation, all the bids must be submitted in writing before any of them is announced, and the land is to be awarded forthwith to the party who offers the highest price above the valuation.
2. The act of 1856 does not repeal § 37, act of March 29, 1832, P. L. 201, nor § 14, act of May 5, 1841, P. L. 353, directing what preferences shall be given in the allotment of land at the appraised value in cases of partition, but restricts their operation to cases in which all the parties decline to offer a price above the valuation.
3. When two or more parties desire to submit a joint bid, they may do so, and if their bid is the highest, the land, or the purpart thereof so bid for, should be awarded to them jointly: the proper practice, under the act of 1856, in receiving bids and allotting purparts, stated: Per Mr. Justice STERRETT.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and WILLIAMS, JJ.

No. 47 January Term 1890, Sup. Ct.; court below, No. 28 August Term 1889, C. P.

On July 18, 1889, John Eyerman brought an action against John J. Detwiller, John Knecht and Jesse Lines, for the partition of a lot of ground in Easton, whereon was erected a building known as the Able Opera House, the plaintiff declaring for the undivided one fourth of said property. On August 19, 1889, upon confession of the defendants, judgment quod partitio fiat was entered. Commissioners to make partition, agreed upon by the parties and appointed by the court, made return on September 2, 1889, that the property could not be divided, etc., and that they had appraised the same at \$60,000. Thereupon, a rule upon the parties to accept or refuse at the valuation was issued, returnable on September 9th.

On the return day of the rule, the defendants claimed that

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their title was older than that of the plaintiff, and that accordingly they were entitled, under § 14, act of May 5, 1841, P. L. 353, to make a bid for the property after any bid that the plaintiff might make should have been put in. The plaintiff objected, and claimed that all parties should hand in their bids before any bid was announced.

The facts respecting the title, as they were made to appear to the court, were that on December 30, 1878, by a deed bearing that date, the Merchants Bank of Easton conveyed the property in question to John Eyerman, grandfather of the plaintiff, and to the defendants, and on January 6, 1883, John Eyerman, Sr., died intestate, leaving a widow, who on March 1, 1886, released her dower in said premises, and leaving, also, the plaintiff as his only heir at law.

The court took the matter under advisement, enlarging the rule to September 16th, upon which day SCHUYLER, P. J., filed the following opinion:

The real estate in controversy is what is known as Able's Opera House, in this city. It was purchased by the defendants in connection with John Eyerman, Sr., and these four persons held title to the property as tenants in common for a number of years, when Mr. Eyerman died and his interest descended to the plaintiff. The plaintiff being unable to agree with the defendants as to the management of the property, the present writ was sued out, under which the property has been duly valued and appraised at \$60,000, and the parties are now before the court to accept or refuse the same. To regulate the practice, at this stage of the proceedings, the act of April 22, 1856, § 10, P. L. 584, was passed, which provides as follows: "In all cases of partition of real estate, in any court wherein a valuation shall have been made of the whole or parts thereof, the same shall be allotted to such one or more of the parties in interest, who shall, at the return of the rule to accept or refuse to take at the valuation, offer in writing the highest price therefor above the valuation returned, but if no higher offer be made for such real estate, or any part thereof, it shall be allotted or ordered to be sold as provided by law."

This act is sufficiently clear, as far as it goes, but it is defective in not furnishing an answer to the question as to the

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order in which the offers or bids are to be made, which is the sole question, limited by the facts before us, for present decision. "The purpose of the act certainly was to enable the parties to correct unfairness or under-valuation, and make the premises command the highest price:" *Klohs v. Reifsnnyder*, 61 Pa. 244. But this same case is authority for the statement that it was not the purpose of the act to "convert the court room into an auction, where the property would rise by small bids until it had reached the highest price that interest or pertinacity could force it up to." Unless, therefore, the court should compel all parties to hand their offers in together, which, as we shall see, would, in a case circumstanced like the present, defeat the legislative intent elsewhere expressed, there must be some order in which the offers should be made; and the question as to what order becomes an important one, since the party having the last offer has clearly the advantage.

As has been seen, the act is not confined to the Common Pleas, but applies to "all cases of partition of real estate in any court." Soon after the passage of the act, the Orphans' Court for this district inaugurated a practice, which has been adhered to ever since, of allowing the eldest son to accept the real estate at the valuation, and then if any one or more of the other heirs offers more than the appraised value, the eldest son is allowed the final bid, thus giving him a decided preference. The reason for this was and is that the legislature, by the act of March 29, 1832, § 37, P. L. 201, had declared that in the partition of real estate in the Orphans' Court the eldest son should be preferred. Our practice was brought to the attention of the Supreme Court, as appears by the appellee's paper-book, and was indirectly approved of in *Bartholomew's App.*, 71 Pa. 292, where the court say that the act of 1856 does not interfere "with the order of choice" provided for in the act of 1832.

In the Common Pleas, however, strange as it may seem, there does not appear to be any established practice to suit a case like the present. True, in *Klohs v. Reifsnnyder*, *supra*, which was a Common Pleas case, the Supreme Court say that "the true interpretation of the act of 1856 warrants only a single offer in writing, and that the court can compel all parties to hand their offers in together, or permit them to seal them up,

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until the court shall order them all to be opened." But what is here said must be understood in its application to the case then in hand, which was a contest between parties whose titles bore the same date, whereas [in the case at bar the title of the plaintiff is many years younger than that of the defendants.] ¹

The distinction is an important one, for the following reason: Where all the titles bear the same date, in such a case it rests in the discretion of the court to which of the parties the land will be allotted: *Dana v. Jackson*, 6 Pa. 236. But where the parties hold the real estate by titles differing in date, there it becomes possible to apply the act of May 5, 1841, § 14, P. L. 353, which provides that "in all cases of partition in the Common Pleas, the court shall allow the holders of the titles to the land, or parts thereof, to take the same, or parts thereof, consecutively, according to the dates of their respective titles." The significance of this act in its application to the present case lies in the fact of the preference which it declares in favor of the holder of the oldest title, just as the act of 1832 declares a preference in favor of the oldest son.

In *Klohs v. Reifsnyder*, supra, a case decided thirteen years after the passage of the act of 1856, the Supreme Court say "Election by seniority and sex belongs solely to the proceeding in the Orphans' Court. . . . In the Common Pleas, since the act of 5th May, 1841, preference is given to the seniority of title;" thus recognizing that both the preference for the oldest son, as declared in the act of 1832, and the preference for the holder of the oldest title, as declared in the act of 1841, must be respected in administering the act of 1856. It is in strict accordance with this idea, as has been seen, that the oldest son is uniformly allowed in the Orphans' Court the privilege of making the last bid. By the same token, the same privilege should be extended in the Common Pleas to the holder of the oldest title. Consistency, if nothing else, would require as much, but we think we have no discretion in the matter.

If we are right in this, then the contention that the parties should be compelled to hand in sealed bids has nothing to rest upon, for that would put the parties on an equal footing and defeat the preference which the legislature, whether wisely or unwisely it is not for us to say, has created. Besides, in a court of justice, the proceedings should be conducted openly,

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except in a case of clear necessity. Where partition is sought in the Common Pleas between parties whose titles all bear the same date, secret offers might afford the only feasible mode of deciding to whom the allotment or allotments should be made, for the act of 1841 is not adapted to such a case; but where, as here, the titles bear different dates, the act applies and its mandate must be obeyed. With the supposed hardship of according to the present defendants the last bid, we have nothing to do, if we have read the legislative intent correctly, but the following extract from the opinion of THOMPSON, C. J., in Bartholomew's Appeal, *supra*, may not be out of place: "An heir," and the same is equally true of any other party, "wishing any certain appraised purpart, ought to make up his or her mind and offer what he or she is willing to give for it above the appraisement, and not depend upon what others may be willing to do. By the rule established in Klohs v. Reifsnyder, this is the only mode by which such a wish may be gratified."

Thereupon the plaintiff handed in to the court a sealed bid offering to take the property at an advance of \$5,000 over the valuation. The court, against the objection of the plaintiff, opened this bid and announced what it was. The defendants then made a bid in writing offering to give \$5,050 above the valuation, whereupon the court decreed that the property be allotted and adjudged to the defendants at \$65,050, they paying to the plaintiff, after deducting costs, the one fourth of that amount. The plaintiff, having excepted to the order of the court, then took this appeal, specifying that the court erred:

1. In making the finding in its opinion embraced in [] ¹
2. In permitting the defendants to make the last bid.
3. In opening and announcing the plaintiff's bid before the defendants made their bid.
4. In allotting the real estate to the defendants at their bid.

Mr. H. D. Maxwell, for the appellant:

It is immaterial, in our view, whether the defendants have priority of title or not, as the case is governed by § 10, act of April 22, 1856, P. L. 534; and, if the purpose of that act was, as stated by Mr. Justice AGNEW in Klohs v. Reifsnyder, 61 Pa. 240, to "correct any unfairness and under-valuation, and make

Arguments.

the premises command the highest price," it follows, as a necessary conclusion, that the bids must in all cases be sealed or handed in simultaneously, as this is the only method by which that purpose can be effected. The act of 1856 limits the application of § 37, act of March 29, 1832, P. L. 201, and § 14, act of May 5, 1841, P. L. 353, to cases where no one desires to bid over the valuation, but one or more of the parties desire to take at the appraisalment. When bids are made they must all be handed in together or sealed: Scott on Intest. Law, § 87; 1 Rhone's O. C. Pr., 537. Such is the almost universal practice throughout the commonwealth, as we have ascertained by inquiries. We do not admit, however, that the defendants have priority of title. The plaintiff, coming in by descent, stands in the place of his ancestor, and has the same rights the latter would have if living.

Mr. O. H. Meyers, for the appellees :

1. Although the plaintiff has the same estate that his grandfather had, he has a different title; the former had a title by purchase, and the latter has one by descent. The act of April 11, 1799, 3 Sm. L. 387, authorizes the Courts of Common Pleas, in cases of partition, to determine to whom the lands shall be awarded. By act of May 5, 1841, P. L. 353, the court is directed to allow the parties to take consecutively, according to the dates of their respective titles. The act of April 22, 1856, P. L. 534, provides that the land shall be allotted to such one or more of the parties as shall offer in writing the highest price above the valuation. Neither of these acts repeals any prior one. They together constitute one entire system, and are to be construed together. The preference which the act of 1841 gives to the holder of the elder title, was therefore properly accorded to the defendants in the bidding under the act of 1856, by permitting them to make the final offer.

2. It will be observed that the act of 1856 simply authorizes offers in writing, without saying how and in what manner they are to be made. The court below, therefore, had discretionary power, under § 21, act of June 16, 1836, P. L. 787, to regulate the practice; and, indeed it has such authority at common law, under its general powers: *Vanatta v. Anderson*, 3 Binn. 417; *Snyder v. Bauchman*, 8 S. & R. 335; 1 Tr. & H. Pr., 122, note.

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The expediency of the rules of practice established by it is not a question for this court: *Gannon v. Fritz*, 79 Pa. 303. The mode of procedure established in Northampton county does not deprive any one of the right to make an offer in writing, which is all the statute provides for. Wherein, then, is there any violation of law, or any injustice in it? The legality and propriety of such proceeding has been acquiesced in by this court: *Sutton's App.*, 112 Pa. 598; *Klohs v. Reifsnnyder*, 61 Pa. 240; *Bartholomew's App.*, 21 Pa. 291; *Mason's App.*, 41 Pa. 74. Our mode of procedure has prevailed for a third of a century. It is the law for our judicial district, and its validity and fairness are not to be determined by different modes pursued in other districts.

OPINION, MR. JUSTICE STERRETT :

The subject of this action of partition is a lot, and building thereon, known as the Able Opera House, which was conveyed in fee by the Merchants' Bank of Easton to John Detwiller, John Knecht, Jesse Lines, and John Eyerman, Sr., as tenants in common. In 1883, Eyerman died intestate and without issue, and his undivided one fourth interest in the property descended to his grandson and only heir at law, John Eyerman, the plaintiff. Commissioners appointed by the court found that the property could not be divided, and they appraised the same at \$60,000. On return of the rule to accept or refuse, etc., the defendants claimed priority of title, and insisted that under § 14, act of May 5, 1841, they were entitled to the last bid. The plaintiff objected, claiming that the proper practice, under the act of April 22, 1856, was for all the parties, who desired to offer more than the valuation, to submit their respective bids in writing to the court before any of the bids were announced; but the court held that, by reason of their priority of title, the defendants were entitled to bid last. The plaintiff then presented a sealed bid, offering \$5,000 above the valuation returned by the commissioners. That bid was opened and read aloud by the court, and, notwithstanding plaintiff's objection, a bid in writing by the defendants offering to give \$5,050 over the valuation was received, and thereupon the property was allotted and decreed to them, they paying to the plaintiff, after deducting costs, one fourth of \$65,050, the in-

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creased valuation. Exceptions, filed by plaintiff, to the action and final decree of the court having been dismissed, this appeal was taken.

The controlling question presented by the specifications of error is whether a proper construction of § 10, act of April 22, 1856, does not require all bids to be submitted to the court in writing before any bid is announced. We are clearly of opinion that it does. In the Orphans' Court, the right to take at the appraisement is in the order of birth, preferring males to females: Act of March 29, 1832, § 37. In the Common Pleas, the act of April 11, 1799, directed that, "in case each of the persons interested, or more than one of them, shall be willing to take the lands and tenements at the appraised value, . . . the court shall determine to whom they shall be conveyed." But that was changed by the act of May 5, 1841, which provides that, in the Common Pleas, "the court shall allow the holders of the title of the land, or parts thereof, to take the same, or parts thereof, consecutively, according to the dates of their respective titles, legal or equitable." Then came the act of April 22, 1856, which effected a radical change in the theretofore established practice in both courts, by providing: "In all cases of partition of real estate, in any court, wherein a valuation shall have been made of the whole, or parts thereof, the same shall be allotted to such one or more of the parties in interest who shall, at the return of the rule to accept or refuse to take at the valuation, offer in writing the highest price therefor above the valuation returned; but, if no higher offer be made for such real estate, or any part thereof, it shall be allotted or ordered to be sold as provided by law."

While the section above quoted does not repeal the acts of 1832 and 1841, it has the effect of restricting their operation to cases in which all the parties in interest decline to exercise the right of offering to take some or all of the purparts at a price above the valuation. When the parties are properly before the court, in obedience to the rule to accept or refuse, it is the first duty of the court to give each of them an opportunity of presenting one bid, in writing, for each separate purpart, in its order, if more than one, and no bid should be announced, or in any manner disclosed, until those present and desiring to do so, have handed in their bids on the purpart then being acted

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on. Then the bids should be opened by the court or by its direction, and the purpart bidden for forthwith announced to the party who offers therefor the highest price over the valuation. If two or more of the parties desire to submit a joint bid, there appears to be nothing in the act to forbid it, and, if their joint bid is the highest, the purpart should be awarded to them jointly. Each purpart, if there is more than one, should be taken up in its order, and disposed of in like manner. After all the parties, respectively, have thus had an opportunity of making a written offer for each purpart, and one or more purparts remain for which no bid was offered, they should be allotted according to the provisions of the prior acts of 1832 or 1841, as the case may be, and, if not taken at the valuation, an order of sale may be made. This is an outline of the practice now almost universally recognized in our courts, and we think it accords with the letter, as well as the spirit of the act of 1856. All the parties, without regard to age, sex, or seniority of title, are thus placed on a footing of equality, so far as it is practicable to do so. Neither can have any undue advantage of the other. If properly conducted, the practice operates as a safeguard against the evils of under-valuation, trickery, etc., which the act of 1856 was intended to remedy.

In *Klohs v. Reifsnyder*, 61 Pa. 240, Mr. Justice AGNEW, speaking for this court, said: "The purpose of the act certainly was to enable the parties to correct unfairness or under-valuation, and make the premises command the highest price. In this view a second bid would be but fair. But, on the other hand, over-bidding leads to unfairness, and incites parties to a series of feints in bidding, to enable one to overreach the other. Selfish or even malicious pertinacity may force one who must have the property to pay more than it is worth, or greater wealth may, for unfair purposes, bid it away from another, whose circumstances require him to get it. In addition to this, such an interpretation would convert the court room into an auction, where the property would rise by small bids until it had reached the highest price that interest or pertinacity could force it up to. We are of opinion, therefore, that the true interpretation of the act of 1856 warrants only a single offer in writing, and that the court can compel all parties to hand their offers in together, or permit them to seal them up until the court shall order them all to be opened."

Syllabus.

While the clear and comprehensive construction of the act of 1856, in the opinion above quoted, may be broader than the decision of the question then before the court required, we have no doubt as to its entire accuracy, and think it sustains appellant's contention that preference cannot be recognized when a bid higher than the valuation is offered. The act evidently warrants only a single offer, and that must be in writing. The court should require all offers to be submitted before any of them is announced, and then the right to take belongs to the party whose offer over the valuation is the highest. The action of the court in permitting the defendants to bid, after the offer submitted by the plaintiff was publicly announced, gave them an undue advantage over him, never contemplated by the act. If they desired to bid, they should have been required to submit their offer in writing, before his was announced or they knew what his bid was.

It is unnecessary to consider other questions that were brought to our notice on the argument. In view of what has already been said, they become immaterial.

Decree reversed at the defendants' costs, and record remitted for further proceedings in accordance with this opinion.

F. WEISS v. BOR. OF SOUTH BETHLEHEM.

APPEAL BY DEFENDANT FROM THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY.

Argued March 18, 1890—Decided October 6, 1890.

[To be reported.]

136	294
149	92
136	294
162	504

136	294
205	466
136	294
e208	*193
24 SC	*115
25 SC	*399

1. Dedication of land to public use as a highway is a question of intention. When the intention to dedicate exists, and the way is used by the public, the dedication will become effective without reference to the length of time covered by such user; but, when there is no such intention, the user will not work a dedication, however long continued.
2. A mere permissive use by the public, as a street, of a piece of ground left open by the owner in front of his property, and concurrently used by himself in his own business and for his own convenience, will not work a

Statement of Facts.

dedication to public use, nor will it confer upon the public any right as against the owner.

3. An owner may make a limited dedication in favor of the public, resumable at his mere pleasure, or may suffer a permissive use by the public for all purposes of passage, jointly with himself, without in any degree impairing his right to terminate such privilege at any time: *Gowen v. Phila. Exchange Co.*, 5 W. & S. 142; *Griffin's App.*, 109 Pa. 150.
4. When there is no other evidence of dedication than the mere fact of public user, so that the right claimed by the public is purely prescriptive, it is essential, to maintain it, that the user or enjoyment should be adverse, uninterrupted and exclusive for twenty-one years: *Commonwealth v. Cole*, 26 Pa. 187, distinguished.
5. It is not error to instruct a jury that the facts that a strip of ground has been used by the public as a street continuously for twenty-one years, that it leads from one avenue to another and is the natural route to and from several manufactories, and that a building line has been maintained by property owners along it, are "some evidence" of dedication, but not conclusive.
6. In assessing damages for the laying out of a public street, in front of a manufacturing establishment and between it and a railroad, the jury may consider whether the loss of the right of the owners to lay a private siding upon the site of the street, control its use, and keep cars standing thereon at their pleasure, will affect the market value of the property.
7. In assessing damages for the laying out of a borough street, interest from the date of the taking should be awarded to the owner as a part of his damages; the provision in § 27, act of April 3, 1851, P. L. 320, amended by § 2, act of May 22, 1883, P. L. 39, that interest shall be allowed "from the date of the adjudication," relating only to the subject of interest upon the award when made.

Before PAXSON, C. J., STERRETT, GREEN, CLARK and WILIAMS, JJ.

No. 153 January Term 1890, Sup. Ct.; court below, No. 16 December Term 1887, C. P.

On October 24, 1887, Francis Weiss entered his appeal from the report of viewers, appointed by the Court of Quarter Sessions of Northampton county, to assess the damages arising from the opening of Front street as a public street of the borough of South Bethlehem, which report awarded "no damages." Issue. Before trial Francis Weiss, the plaintiff, died, and his executors, Francis Weiss, Jr., and George H. Myers, were submitted.

At the trial, on March 29, 1889, the following facts were shown:

Statement of Facts.

In 1887 Francis Weiss, deceased, the original plaintiff, was the owner of a piece of ground in South Bethlehem borough on which was a scoop or shovel factory. His property was described in his title deeds as bounded on the west by Brodhead Avenue and on the north by the right of way of the Lehigh Valley Railroad Company. Between the buildings erected thereon and the railroad right of way, was an open space, thirty feet in width, extending from Brodhead Avenue, eastward, through to Northampton Avenue. In 1887, the borough authorities enacted an ordinance laying out Front Street, between Brodhead and Northampton Avenues, as a public street. The street, as laid out, started at Brodhead Avenue, occupying twenty feet of the open space between the shovel factory and the railroad, and continued eastward in a straight line, and with the uniform width of twenty feet, until it reached the property next to Northampton Avenue, when it deflected toward the railroad.

Testimony for the plaintiffs tended to prove that the open space between the factory and the railroad had been used by the proprietors of the Weiss property since as early as 1868, in connection with the loading and unloading of freight shipped upon the railroad; that the construction of a siding, connecting the shovel factory with the railroad, was necessary for its economical operation, and that the loss of the right of its owners to lay a private siding upon the street and control its use, would largely depreciate the value of the property.

Testimony for the defendants tended to prove that the strip of thirty feet, part of which was occupied by Front street as laid out by the borough, had been used by the public as a passage way between Brodhead and Northampton Avenues, continuously for twenty-one years prior to the enactment of the ordinance; that, both the buildings on the Weiss property and all the buildings on other properties between it and Northampton Avenue, stood upon the line of that strip, and that it had never been built upon except in one instance, an owner of the lot next to Northampton Avenue having erected an ice house across it about 1884 or 1885, which stood for about a year after its construction.

The borough, at the time of the trial, had not made any physical change upon the ground embraced within the street, or taken formal possession thereof.

Charge of Court below.

At the close of the testimony, the court, REEDER, J., charged the jury in part as follows :

The defendant seeks to defeat the executors' right to recover in this action, because of an allegation that the land taken by the borough of South Bethlehem as a public highway was dedicated at some previous time by either Francis Weiss, or his predecessors in title, or by their joint action, as a public highway of the borough of South Bethlehem. If there was such a dedication of the land occupied by this street, then, of course, the estate of Francis Weiss suffers no damage, because, if there was a public highway there by reason of the dedication by Francis Weiss, or by his predecessors in title, then the borough in accepting it accepted only that which Francis Weiss dedicated to the public, and his estate would suffer no damage by reason of which they would be entitled to recover in this action. Your first inquiry, therefore, will be, was there such a dedication?

Dedication, after all, is a mere question of intention ; and, before you can find that there was a dedication in this case, you must find that there is some evidence, either of the method or manner of its use, or from the testimony of the witnesses, or from the character of the land, or the nature of the locality, satisfying you that there was an intention on the part of some of the predecessors in title of Francis Weiss, or on the part of Francis Weiss himself, to dedicate this land to the public as a street.

[Dedication of land to the public as a street differs very materially in its character from the right acquired by prescription. One acquires a right by prescription in another man's land, by continuous and adverse user for a period of twenty-one years. Where a user of another man's land is exercised for a period of twenty-one years, and it is adverse, that is conclusive evidence of a right by prescription. It is not so, however, with evidence of dedication. The user by the public for twenty-one years of land as a public highway, is some evidence of dedication, but you must find more than this ; the character of its use must satisfy you that there was an intention to dedicate.]³ A right by prescription is acquired by an adverse user. A right by dedication rests upon the presumption that the person owning the land intended to have the property used as a public highway.

Charge of Court below.

Where a man owns land and he opens it for his own use, or where he neglects to close it up, or does not build upon it, but throws it open for the use of his own business, and, as an incident to such opening of the land for his own use, it is also used by the public, this is not a dedication to the public. That is to say, that where a jury is satisfied from the testimony that the land is left open for any adjoining property owner to use as a matter of convenience in his business, and, incidental to that use, it is also used by the public generally, then that is not a dedication; because, if it were opened by the owner for his use, although the public may have used it jointly with himself, yet that is only what is called a permissive use, a mere license to the public to use it while using it himself, and it is not a dedication. [The circumstances of the opening of the land, the use of the land by the public, and the evidence in the case, must satisfy you that there was an intention to convey this land to the public for public use as a highway, before you can find that there was a dedication of the land to the public.] ⁴

If you find, therefore, in considering this question of dedication, that the testimony in this case satisfies you that there was a dedication of this land on the part of the owners of the property as a public highway, then the plaintiffs are not entitled to recover, and your verdict will be in favor of the defendant. If, however, you find that there was no intention to dedicate this land on the part of the plaintiffs in this action, or their predecessor in title, then you will determine what damages the plaintiffs have suffered. . . .

The measure of damages in cases of this kind is the difference in the market value of the property immediately before and immediately after the opening of the street, as affected by the taking of the land and the opening of the street. . . . In estimating the difference in the market value, you have a right to take into consideration all the injuries that the plaintiffs have sustained, and all the rights they have actually lost, as well as the improvement or increase in the value of the land remaining.

It is true, as contended for by the defendant, that the opening of Front street on this twenty feet wide strip will not take away from the Lehigh Valley Railroad Company the right to construct switches over this street. The Lehigh Valley Rail-

Charge of Court below.

road Company, under their charter and under the general laws of Pennsylvania, have the right to construct switches across all public streets, and they consequently would have a right to construct a switch into this property, although in front of it between the railroad and the property itself there was a public street. [If the owners of this property desired to have a switch upon it, and the Lehigh Valley Railroad Company were willing to lay it, the fact of a street being in front of their property and between that and the railroad, would not interfere with the railroad company's laying the switch, if they choose to do so. But it does take away from the owners of the property the right to lay the switch themselves.]⁵

It is also true, as contended for by the defendant, that the plaintiffs cannot construct a switch and connect it with the tracks of the Lehigh Valley Railroad Company without the latter's consent.* But, having connected it, they could run the switch wherever they chose upon their own property, keep cars standing upon it how and when they chose, and they would have sole control of it. It is also true, that, while the Lehigh Valley Railroad Company would have the right to run a switch across the street they would have no right to keep cars standing upon it. [If the right either to control that switch, run it, independent of any railroad company, in the construction of it, where they choose, except only so far as connection with the main track is concerned, and the right to have cars standing upon the switch so constructed, if that is a deprivation of a right which the plaintiffs would no longer have if this is a public street, and if that entered into the decrease of the market value of the property, then it would be an element for you to take into consideration, in estimating the damages which the plaintiff may have suffered by reason of the opening of this street. You will also determine what the land was worth. . . . Whether the taking of the land is a loss or not; whether the deprivation of the right to lay the switches themselves and themselves control their use, and to have the cars standing upon them at their own pleasure, is the deprivation of any right, or whether it is of any value or not, or, if of value, whether that value is greater than the apprecia-

* See Pittsb. etc. R. Co. v. Robinson, 95 Pa. 426.—Rep.

Charge of Court below.

tion of the land which remains, is a question of fact for your determination, and one that is solely within your province.]⁶

The plaintiffs request the court to charge :

1. A space left open in private property bordering on a highway, for the accommodation not of the public but for the accommodation of the owner, is not thereby dedicated to public use, but may be resumed at pleasure ; and in such case the question of dedication should be withdrawn from the jury.

Answer : Affirmed.

4. If there was no dedication of the strip of ground taken for public use as a street, measuring one hundred and twenty-nine feet along the Lehigh Valley Railroad, and in depth twenty feet, then the plaintiff, Francis Weiss, was the absolute owner thereof, and had the right to build up to the line of the railroad, to use it for loading and unloading without a switch, or, to connect the manufacturing establishment with the railroad, on obtaining their consent, at any point along his entire front, by switch or switches, and to lay said switches longitudinally or obliquely across said strip, as he pleased, and to block up said space with standing cars, without requiring the consent or being under the control of the authorities of South Bethlehem.

Answer : Affirmed.

5. By the opening of said strip as a street of a borough, the borough of South Bethlehem has acquired the right and it becomes their duty to keep it free from obstructions to travel, and the former owners have lost the rights on said strip mentioned in the foregoing point.

Answer : This point I affirm, as qualified by what I have already said.

7. Plaintiff is entitled to be compensated for the value of the land taken, as well as for such switching privileges as he has lost by the opening of the street.

Answer : This point I cannot affirm. The measure of damages, as I have said, is the difference in the market value of the property left, as compared with the value of the property immediately before and immediately after the opening of the street. It is true, that in estimating that difference the jury have a right to take into consideration the value of the land taken, as well as such switching privileges as the plaintiffs may have lost by the opening of the street.

Charge of Court below.

8. The measure of damages is the difference in the market value of the entire scoop works, before and after the taking of the land; and if the jury should ascertain such difference, they should calculate interest on it from October 10, 1887, the date when the report of viewers was filed.

Answer: Affirmed.⁷

The defendant requests the court to charge:

1. If the jury find that the twenty feet in question have been used by the public as a street continuously and uninterruptedly for twenty-one years prior to its adoption as a street, that is evidence of public dedication.

Answer: This point I affirm. It is some evidence of a dedication to the public.⁸

2. If the jury find that there was an easement in the public upon the said twenty feet, by which the public have the right to use it as a public street, then the formal opening or adoption of the street within the lines in which the public have acquired an easement would be no damage to the Weiss property, and the verdict should be for the defendant.

Answer: Affirmed.

3. Public dedication is a question of intention; and the fact of this twenty feet having been used by the public as a public street, and the fact that this twenty feet leads from Brodhead Avenue to Northampton Avenue, and that a building line has been maintained and observed by the property owners along the said strip, and that it is the natural route to and from the front of the Brass Works, the Boiler Works and the Bethlehem Iron Company property, is all evidence of dedication and the intention to make it a public highway.

Answer: This point I affirm, with the qualification that it is not conclusive evidence. It is some evidence.

4. If the jury find that this road of twenty feet in front of the Weiss property is a benefit or advantage to said property, that should be taken as a set-off to any claim for damages.

Answer: This point I affirm, in connection with what I have already said in regard to the measure of damages.

The jury rendered a verdict for the plaintiffs for \$2,868.88. A rule for a new trial having been discharged, judgment was entered on the verdict; whereupon the defendant took this appeal, assigning for error:

Arguments.

2. The answer to defendant's point.³
- 3-6. The parts of the charge embraced in []^{3 to 6}
7. The answer to the plaintiffs' point.⁷

Mr. J. Davis Brodhead, for the appellant:

1. The defendant's position at the trial was that if the land had been used by the public for more than twenty-one years, continuously and uninterruptedly, as a public street, the plaintiffs were not entitled to any damages. The court erred in instructing the jury that, while such user was some evidence of a dedication, it was not sufficient of itself to establish the dedication, and in giving the jury to understand, by the general tenor and effect of the charge, that something more was required from the defendant than an adverse user of the easement by the public for twenty-one years, to raise a presumption of dedication: 2 Dillon on Mun. Corp., § 637; Thayer v. Boston, 19 Pick. 511; Oustott v. Murray, 22 Ia. 457; especially as the way in question connects two public streets or highways: Valentine v. Boston, 22 Pick. 75; Commonwealth v. Cole, 26 Pa. 187; Esling v. Williams, 10 Pa. 126; Trauger v. Sassaman, 14 Pa. 514; Okeson v. Patterson, 29 Pa. 22; Workman v. Curran, 89 Pa. 226; Demuth v. Amweg, 90 Pa. 181. There is no authority to sustain the attempted distinction between a right by prescription and one by dedication, as to the evidence necessary to establish the right.

2. Without the company's consent, the plaintiffs could not construct a switch, street or no street. How, then, can the opening of the street deprive the plaintiff of any such right? If the company consents, they can still lay it across the street under the company's rights. In the part of the charge embraced in the sixth specification, the court submitted to the jury the question of law whether the opening of the street would deprive the property owners of certain imaginary rights which are entirely too unsubstantial and remote to be considered in assessing damages: Hornstein v. Railroad Co., 51 Pa. 87. And it was error to instruct the jury to allow interest from the filing of the report of viewers. The act of April 3, 1851, § 27, P. L. 326, amended by act of May 22, 1883, P. L. 39, allows interest only from the date of adjudication of the damages, and none were adjudicated by the viewers, for they

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allowed none. As the street was not opened, and could not be, under the statute, until liquidation of the damages, the plaintiffs were entitled to no interest prior to the verdict: *Norris v. Philadelphia*, 70 Pa. 332; *Second St.*, 66 Pa. 132; *Stewart v. County*, 2 Pa. 340.

Mr. W. E. Doster, for the appellees:

1. The defendant not having shown that the user by the public was adverse, the testimony on that subject became evidence, merely, on the subject of dedication, and the defendant had the full benefit of it as such. The defendant's first point omits the word adversely, in describing the user, and therefore the answer of the court to it was an accurate statement of the law. The authorities cited by the defendant establish the proposition that when the user is not adverse, no presumption arises, nor any title by prescription. The distinction drawn by the court between rights acquired by prescription, and those acquired by dedication, is sound and supported by the authorities: *Washburn, on Easements*, 3d ed., 179, 183; *Gowen v. Phila. Exchange Co.*, 5 W. & S. 141; *Duncan v. Hanbest*, 2 Brewst. 362; *Neill v. Gallagher*, 10 Phila. 172; *Biddle v. Ash*, 2 Ash. 211; *Griffin's App.*, 109 Pa. 150.

2. The court clearly defined the plaintiff's right of dominion over his land, and the rights which he lost when he ceased to be the owner and the borough became the owner. There is no ground for the assertion that he lost no rights. The jury have found, as a fact, that the switching privilege cannot be exercised as before, and have found, also, that this fact affects the market value of the property. It was therefore proper for consideration in assessing the damages: *Allegheny v. Black*, 99 Pa. 152; *Shenango etc. R. Co. v. Braham*, 79 Pa. 447; *Setzler v. Railroad Co.*, 112 Pa. 56; *Pittsb. etc. Ry. Co. v. McCloskey*, 110 Pa. 436. The report of the viewers was an adjudication on the question of damages, and interest runs from its filing, under the acts of April 3, 1851, P. L. 320, and May 22, 1883, P. L. 39; *Penna. R. Co. v. Cooper*, 58 Pa. 408; *Delaware etc. R. Co. v. Burson*, 61 Pa. 369; *Allegheny v. Campbell*, 107 Pa. 580; *Penna. R. Co. v. Patterson*, 73 Pa. 491. The cases cited on this point by the defendant were decided under special statutes.

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OPINION, MR. JUSTICE GREEN:

The learned court below, in answer to the defendant's first point, distinctly charged the jury that if the plaintiff's ground in question had been used by the public as a street continuously and uninterruptedly for twenty-one years, prior to its adoption as a street, that is evidence of a public dedication. In answer to the second point of the defendant, the jury was instructed that if the public had an easement upon the twenty feet strip in question, to use it as a public street, the opening or adoption of the street within the lines of the easement would be no damage to the Weiss property, and the verdict should be for the defendant. The defendant's third point requested an instruction that public dedication is a question of intention, and the fact of the twenty feet strip having been used by the public as a public street, and the fact that it leads from one avenue to another, and that a building line had been maintained by the property owners along the strip, and that it is the natural route to and from the works of several companies, is all evidence of dedication and the intention to make it a public highway. This point and the first were affirmed, with the qualification that the facts mentioned in the points were some evidence of dedication, but not conclusive. The second point was affirmed without qualification. In the general charge the court more specifically instructed the jury that if there was a dedication of the land to public use as a street, either by Francis Weiss or any of his predecessors in the title, there could be no recovery by the plaintiffs. That use of land for a street which constitutes a dedication, was carefully explained to the jury. They were told that it was a question of intention; if the intention to dedicate existed, it would become effective without reference to the length of time the way might be used, but if there was no intention to dedicate, the user would not take effect as a dedication, no matter how long it was continued. The jury was also instructed, that a mere permissive use by the public of a piece of ground left open by the owner in front of his property, and used by him in his own business and for his own convenience, was not a dedication to public use, and conferred no right upon the public as against the owner. And the jury was further instructed, that the question whether or not there was a dedication, in this case, depended upon the

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facts in evidence as to the opening of the land, the character of its use by the public, the character of the property, the nature of the land and its surroundings, and all the other circumstances in the case, and if they found that there was an intention to dedicate on the part of the owner, they would be warranted in finding that there was an actual dedication, and in that event their verdict should be in favor of the defendant. We fail to find any error in these instructions; on the contrary, they are in precise accordance with the whole current of authorities upon this subject.

Complaint is made in the first four assignments of error, that the court did not give adequate effect to the theory of an adverse use, for twenty-one years, of the road by the public, and that the jury were misled by the charge and answers, because the court did not distinctly say that if the use of the road by the public was adverse, and continued for twenty-one years, it would give a conclusive right to the public. It would be a sufficient answer to say that the case was tried upon the theory of a dedication, and that this is apparent from the points of the defendant, as well as from the points of the plaintiffs. The attention of the court was not called by any point to the effect of an *adverse* user, nor to the proposition that an actual user by the public for twenty-one years would, of itself alone, be proof of an adverse user. The court could not be convicted of error for omitting to say what it was not asked to say. But the court did say that there was a difference between the acquisition of a private right of way over the land of an owner by twenty-one years' continuous adverse use of the way by another, and the acquisition of such a right by the public founded upon a dedication of the land to public use; that, in the former case, a conclusive presumption of a grant arose, and in the latter, the mere fact of user was not sufficient to establish a dedication, but there must be further proof, indicating an intention to dedicate. We think this was quite correct. In *Dillon on Mun. Corp.*, § 500, where the very precise question is discussed, the writer says: "But where there is no other evidence against the owner to support the dedication but the mere fact of such user, so that the right claimed by the public is purely prescriptive, it is essential, to maintain it, that the user or enjoyment should be adverse; that it was with a claim of

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right, and uninterrupted and exclusive for the requisite length of time." Our attention has not been called to any evidence in the present case, nor have we discovered any, that the user of the public was made with a claim of right, nor that it was exclusive; on the contrary, the evidence was emphatic and uncontradicted that the owners of the Weiss property were in the constant habit of using the ground in front of their works for their own purposes. The evidence seems to present a case of a permissive use by the public of the ground in question, concurrently with the use by the owner, and this has uniformly been held by this court as insufficient to create an adverse right in the public by way of dedication of the owner.

We do not think it necessary to repeat the reasoning of Chief Justice GIBSON in the case of *Gowen v. Phila. Exchange Co.*, 5 W. & S. 142, but only to say that we regard it as entirely conclusive, not only as establishing the right of an owner to make a limited dedication in favor of the public, resumable at his mere pleasure, but also to grant a permissive use by the public for all purposes of passage in front of his land, jointly with himself, without in any degree impairing his right subsequently at any time to terminate such privilege. In the recent case of *Griffin's App.*, 109 Pa. 150, the same doctrine was repeated and enforced, and we have no disposition to qualify the law as stated in that and other cases. The instructions of the learned court below were in exact conformity with these decisions. It is unnecessary also to refer to the cases in which it is held that, even where private rights of way are claimed by adverse user, a permissive use, if shown by the testimony, is destructive of the claim. The case of *Commonwealth v. Cole*, 26 Pa. 187, has no application to this case. No question of dedication arose or was considered. The road in question had been used as a public road for more than twenty-one years, and had been kept in repair at the expense of the township for several years. The proceeding was a prosecution for breaking down a fence across the road, and it was held that the case did not come within the statute imposing a penalty for such an act. What was said in the opinion as to use of ground by the public for a highway for twenty-one years was obiter dictum, and must in any event be held to have been said with reference to the facts of that case.

Syllabus.

The fifth and sixth assignments of error are without merit, and are dismissed.

As to the seventh assignment, it is obvious that the act of 1883, amending the general borough law of 1851, P. L. 320, relates only to the subject of interest after adjudication. The question of interest as a part of the damages for the taking, is not in any way provided for by the act. We have so often held that interest may be allowed from the time of the taking of land for public use by way of damages, and that even a positive direction to allow interest is not error, that we cannot consider it an open question now. In *Del. etc. R. Co. v. Burson*, 61 Pa. 369, we said: "Nor was there error in charging the jury to allow interest. If the plaintiff was entitled to compensation by reason of her property being taken at a particular time, she was certainly entitled to interest as a compensation for its wrongful detention." See also *Allegheny v. Campbell*, 107 Pa. 530. In this case, the court directed the jury that if they found for the plaintiffs they should allow interest from October 10, 1887, the date when the report of viewers was filed. As the land of the plaintiffs was taken before that date, there was no harm to the defendant in fixing that time as the period when interest should commence. We do not think the filing of the report had anything to do with this subject, but it was no injury to the defendant to give such an instruction.

Judgment affirmed.

ESTATE OF DOMINICK BATIONE, DECEASED.

APPEALS BY C. L. BATIONE, AND F. J. MOTT, GDN., FROM THE ORPHANS' COURT OF PHILADELPHIA COUNTY.

Argued March 25, 1890—Decided October 6, 1890.

[To be reported.]

- (a) Subject to certain bequests to his father, sisters and others, a testator bequeathed the whole of his estate in trust for his wife for life, providing that at her death his daughter should enjoy its benefits until she attained the age of twenty-five years, when she should have an absolute right thereto.

136	307
150	218

136	307
388C	499
388C	4500

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(b) He afterwards directed that in case his wife should outlive said daughter, two thirds of the whole estate should be divided equally, at his wife's death, between his father and sisters, and the remaining one third should become the absolute property of his friend, Pedro Salome, or his heirs forever:

1. The interest of the daughter under the will was a vested estate, subject to be divested by her death before her mother: *McCall's App.*, 86 Pa. 254; *Churchman's App.*, 22 W. N. 131; *Montgomery v. Petriken*, 29 Pa. 118; wherefore, the daughter having died in her minority, during her mother's life, the bequest of the one third to Salome took effect.

(c) Two thirds of the estate having been diverted by the election of the widow to take against the will, and by the birth of another child not provided for therein, the sum of \$1,633.33 by consent of all parties, was paid to the testator's father and sisters, for a release of their rights, reducing the trust fund thereby to \$697.89.

2. Salome was entitled, in addition to the one third of the trust fund bequeathed to him, to take the other two thirds, under the equitable doctrine that a bequest to a widow will be sequestrated to compensate a legatee disappointed by her election, said two thirds being less than what the widow would have taken under the will, and less than his loss by reason of her election.

Before PAXSON, C. J., GREEN, CLARK, MCCOLLUM and MITCHELL, JJ.

Nos. 330, 330½ January Term 1889, Sup. Ct.; court below, No. 34 October Term 1878, O. C.

On November 12, 1888, the account of the Fidelity Insurance, Trust & Safe Deposit Company, substituted trustee under the will of Dominick B. Batione, deceased, was called for audit, when the following facts were made to appear:

Dominick Batione died September 5, 1878, leaving a widow, Constance L. Batione, and two children, Modesta and Benicia, both of whom were minors. Benicia was born after the date of his will and was not provided for therein. Said will bore date June 3, 1876, and by it the testator bequeathed all his estate in trust for his wife for life, and at her death "our daughter to enjoy the benefits accruing from it until she attains the age of twenty-five years, when she is to have an absolute right to the whole of my estate, real and personal," such bequest to the trustee being subject to an annuity at the rate of \$30 per month to the testator's father, and to certain bequests in favor of his sisters and others. The will then provided, further, as follows:

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"In the event of my dear wife outliving our child Modesta, at my wife's death two thirds of the whole estate ($\frac{2}{3}$) is to be equally divided amongst my father and sisters then living, the remaining one third ($\frac{1}{3}$) to become the absolute property of my friend Pedro Salome, or his heirs forever."

The widow elected to take against the will.

By an adjudication upon the account of the administratrix, c. t. a., of the testator's estate, confirmed November 13, 1880, credit was allowed for certain sums which had been paid out of the estate to the father and sisters of the testator, by way of compromise of their claims under the will, and in consideration of releases thereof. The bequest to the trustee having been reduced by the election of the widow not to take under the will, and by the birth of Benicia after its date, to one third of the estate, the court charged against said bequest the one third of \$1,000, the sum paid to the testator's sisters, but charged against it the whole of the amount paid the testator's father, to wit, \$1,800. After deducting these charges, the sum of \$697.89 was awarded to the trustee under the will. The remaining two thirds of the sum paid to the sisters of the testator was charged against the widow's share of the estate.

The testator's daughter Modesta died in December, 1887, in her minority, unmarried and without issue. Her mother, and her sister Benicia, survived.

Upon the foregoing facts, the auditing judge, HANNA, P. J., reported an adjudication awarding both the principal and the income in the hands of the accountant to Pedro Salome, and to Constance L. Batione, as mother and heir at law of Modesta Batione, deceased, in the proportion of one third to the former and two thirds to the latter.

Exceptions to the adjudication having been argued before the court in banc, on December 29, 1888, the following opinion was filed, HANNA, P. J. :

After a more careful consideration of the subject of the exceptions, we have reached the conclusion that the position assumed by the exceptant, Pedro Salome, is correct, and that he is entitled not only to the one third bequeathed to him, but, before any distribution, to be repaid the proportion he contributed of the amount paid the other residuary legatees to obtain a release of

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their respective residuary shares. It did not so clearly appear at the audit, but, upon further reflection, we think there can be no doubt that this is the proper conclusion. And it is but equity that it should be so.

It is conceded that testator's daughter, Modesta, was entitled to the income of the trust fund until she attained the age of twenty-five years, when she was to be paid the principal. And, by our construction of the will and the election of the widow to take against its provisions in her behalf, payment of the legacy to Modesta was accelerated and she became entitled absolutely, notwithstanding the provision that it be paid to her at the age mentioned, liable, however, to be defeated by her death before reaching that age, in the lifetime of her mother, when the residuary bequests took effect.

The trustee subsequently, by the payment of a certain sum to the father and sisters of testator, obtained the release of all their interests as legatees. The result was to reduce the fund held in trust; and, as Pedro Salome, as legatee, was interested therein to the extent of one third, he consequently contributed that proportion of the sum paid to secure the releases.

The widow of testator, by her election, had no interest in the fund. Modesta did not survive the age named in the will, but died a minor, leaving her mother surviving, whereupon the legacy held in trust for her became payable to the residuary legatees; but, as before stated, certain of the legatees were no longer interested, and Pedro Salome, the remaining legatee, contributed one third of the amount paid to them.

Under such circumstances, we think it very clear that in equity, before any distribution is made of the fund in excess of his one third residuary share, he should be repaid the sum he was obliged to contribute towards obtaining the releases from the other legatees. In this manner only can he receive the one third of the residue bequeathed by the testator, and if this be not done and he be awarded only his one third of the remainder of the legacy held in trust, an undisposed of balance remains, no part of which he will receive. The amount he contributed was for the benefit of the general estate, and, to ascertain his share, it should be considered either as not having been paid to the other legatees or returned by them to the trustee.

Thus, the entire amount for distribution will be arrived at,

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and of which he is entitled to one third. And now that a fund exists for distribution, the loss he suffered should first be made good to him, and the balance distributed according to the will. It is upon this principle that, where a widow elects to take against the will, a court of equity will sequester the benefits intended for the wife, to secure compensation to those who are disappointed by her election: *Sandoe's App.*, 65 Pa. 314; *Gallagher's App.*, 87 Pa. 200; *Calahan's Est.*, 7 W. N. 180.

The balance of principal and income stated in the account is awarded as herein indicated, and counsel will prepare a decree of distribution in accordance herewith. Any balance of income, however, due Modesta at her death, is awarded to her mother, as heir-at-law, and the costs of the settlement of the account, with counsel fees, to be deducted from the principal.

A decree of distribution was then signed awarding to Pedro Salome one third of the net balance of principal, to wit, \$185.46; one third of the amount, \$1,683.83, paid out of the share of the estate in distribution to the other residuary legatees for their releases, to wit, \$544.44; and the amount of income accruing since Modesta Batione's death, to wit, \$61.40; in all \$617.79; the income accounted for accruing prior to Modesta's death being awarded to Mrs. Constance L. Batione, the widow.

Thereupon, Constance L. Batione took the appeal to No. 330, specifying that the court erred:

1. In deciding that Modesta's interest was defeasible upon her death under the age of twenty-five years, in the lifetime of her mother.

2. In awarding one third of the principal fund to Pedro Salome.

3. In appropriating the remaining two thirds to Pedro Salome, in payment of one third of the sum charged against the trust fund by the adjudication in 1880.

4. In appropriating in like manner the income accruing subsequent to the death of Modesta.

5. In not awarding the whole fund to the appellant.

And F. J. Mott, guardian of Benicia Batione, took the appeal to No. 380½, specifying, *inter alia*, that the court erred:

3. In not awarding two thirds of the principal, and the

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whole of the income accruing after Modesta's death, to the appellant.

Mr. J. W. Goheen, for the appellants :

1. By the clause creating the trust, the corpus of the estate was vested in Modesta absolutely, the time of payment only being postponed until she should be twenty-five years of age. The language of the bequest does not import a condition that she should live to reach that age: *Letchworth's App.*, 30 Pa. 175; *Schrivver v. Cobeau*, 4 W. 180; *Chew's App.*, 37 Pa. 23; *Roberts's App.*, 59 Pa. 70; *Smith on Executory Interests*, §§ 300, 310, 328, 346; *Reed's App.*, 118 Pa. 222; *Provenchere's App.*, 67 Pa. 463. Having vested absolutely in Modesta at the death of the testator, on her death the estate descended to her mother. This is unmistakably the effect of the first provision in the will. Did the testator qualify it by the subsequent provision? We contend that the clause giving the fund to his father and sisters and Salome, was intended simply as a substitute for the prior provisions, to take effect in the event of the daughter's not surviving the testator.

2. Our position is sustained by the authorities laying down the rules by which the interpretation of wills is to be governed: 1 *Swinburne on Wills*, 19; *Woelpper's App.*, 126 Pa. 562; *Middleswarth v. Blackmore*, 74 Pa. 414; *Ferry's App.*, 102 Pa. 207; *Fahrney v. Holsinger*, 65 Pa. 394; *Schoonmaker v. Stockton*, 37 Pa. 463; *Biddle's Est.*, 28 Pa. 59; *Schouler on Wills*, §§ 474, 476, 477, 478; *Shreiner's App.*, 53 Pa. 106; *Newbold v. Boone*, 52 Pa. 174; *Beach on Wills*, 524; *Williams on Executors*, 221; *Sheetz's App.*, 82 Pa. 213; *Wetter's App.*, 20 W. N. 499; *Stevenson v. Fox*, 125 Pa. 568; *Ommaney v. Bevan*, 18 Ves. 291; *Doe v. Considina*, 6 Wall. 458; 1 *Jarman on Wills*, 472-486; *Wood's Est.*, 36 Cal. 75; *Bartlett v. King*, 12 Mass. 536; *Wright v. Denn*, 10 Wheat. 204; *Smith v. Crabtree*, L. R. 6 Ch. Div. 591; *Surtees v. Hopkinson*, L. R. 4 Eq. 98; *Key v. Key*, 4 De G. M. & G. 73; *Langston v. Langston*, 2 Cl. & F. 194; *Abbott v. Middleton*, 21 Beav. 143; *Greenwood v. Greenwood*, L. R. 5 Ch. Div. 954.

3. There is no warrant for restricting the word "outliving" to the time when Modesta would attain the age of twenty-five years, that does not exist, with greater force, in favor of its re-

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striction to the time of the testator's death. The latter would make the will a consistent, congruous whole. If this was not the intent of the testator, he would not have failed to provide for the contingency of his widow's death before that of Modesta. Moreover, the repetition of the reference to his wife's death was wholly unnecessary, if his intention was to qualify the former absolute bequest to his daughter. Any other construction than that we contend for would disinherit any children of Modesta, and this is a controlling consideration: *Scott v. Price*, 2 S. & R. 63; *Holmes v. Holmes*, 5 Binn. 259; *Beltzhoover v. Costen*, 7 Pa. 18; *Howe's App.*, 126 Pa. 233; *Hauer v. Sheetz*, 2 Binn. 545; *Cropley v. Cooper*, 19 Wall. 167; *Goodtitle v. Whitby*, 1 Burr. 234; *Coggins' App.*, 124 Pa. 30; and authorities previously cited. The law leans in favor of an absolute rather than a defeasible estate: *Ryon's App.*, 124 Pa. 528.

4. If the bequest should be construed as not vesting absolutely in Modesta, then we contend, on behalf of the guardian of Benicia, that two thirds of this fund, being undisposed of by the will, descended to Benicia as heir of her father. The decree of 1880, under which \$1,633.33 of the sums paid to the father and sisters was charged to Modesta's share, stands unreversed, and Salome must be presumed to have consented to it. There is, therefore, no equity in the appellee to have any part of it returned to him, and the principle invoked by the court below does not apply. A widow's right to elect to take against a will is inviolable: § 11, act of April 8, 1833, P. L. 250; § 11, act of April 11, 1848, P. L. 537; *Bard's Est.*, 58 Pa. 393; and so is that of an after-born child; § 15, act of April 8, 1833, P. L. 251. The principle referred to will sequester the interests given by the will to the widow, for the benefit of the disappointed beneficiaries: *Pomeroy's Eq. J.*, § 517; *Story's Eq. J.*, § 1084; *Sandoe's App.*, 65 Pa. 314; *Bard's Est.*, *supra*. But it will not justify the taking for that purpose of property which she inherits from another, and, a fortiori, will not justify taking the property of the after-born child.

Mr. Charles H. Sayer, for the appellee:

1. The intention of the testator is clearly expressed by his

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language, and the rules of construction invoked by the appellant are not applicable: *Howe's App.*, 126 Pa. 233. The will clearly provides that in the contingency which has occurred, Pedro Salome should receive one third of the estate. The widow having elected to take against the will, it must be construed as though the portion of the estate going to her did not form a part of it: 3 Redf. on Wills, 389; *Bard's Est.*, 58 Pa. 393; *Brown's App.*, 27 Pa. 62. Equity, however, will sequester the benefit intended for her, in order to compensate those disappointed by her election: *Calahan's Est.*, 7 W. N. 130; *Sandoe's App.*, 65 Pa. 314; *Gallagher's App.*, 87 Pa. 200. The only effect of the subsequent birth of a child is to revoke the will pro tanto: *Walker v. Hall*, 34 Pa. 483; *Coates v. Hughes*, 3 Binn. 498; *Edwards's App.*, 47 Pa. 144; *Hollingsworth's App.*, 51 Pa. 518.

2. When a contingency is annexed to the substance of the gift, and not merely to the time of payment, the legacy is contingent: *Seibert's App.*, 13 Pa. 501; *Dunwoodie v. Reed*, 3 S. & R. 435; *Stump v. Findlay*, 2 R. 168; *Calahan's Est.*, 7 W. N. 130; *List v. Rodney*, 83 Pa. 483; *Peirce's App.*, 4 W. N. 439; *Reiff's App.*, 124 Pa. 145. It makes no difference, so far as we are concerned, whether the legacy to Modesta is contingent, or is vested subject to being divested by the happening of the contingency. The view of the court below, that the latter is the case, may be correct: *McCall's Est.*, 1 W. N. 269; *McCall's App.*, 86 Pa. 254; *Hopkins v. Jones*, 2 Pa. 69; *Umstead's App.*, 60 Pa. 365; *Montgomery v. Petriken*, 29 Pa. 118; *Manderson v. Lukens*, 23 Pa. 31; *Kirk's Est.*, 6 Phila. 73; *Churchman's Est.*, 20 W. N. 367; *Churchman's App.*, 22 W. N. 131; *Fearne on Rem.*, 10, note *h.*; *Idem* 16.

3. Under the terms of the will, Salome is entitled to one third of the whole estate; but there was left only one third for the will to operate upon, and he receives but one third of that. This loss was occasioned partly by the election of the widow, and she is now the claimant of this whole fund. As the testator's father and sisters have released their claim to the two thirds of this money, there is a fund, arising from circumstances not contemplated by the testator, which is in the same position as a lapsed residuary legacy: *Everman v. Everman*, 15 W. N. 417; *Reed's Est.*, 82 Pa. 428; 1 Redf. on Wills, 437. The

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court below clearly states the principles upon which Salome is entitled to be recompensed out of that fund. See also Sandoe's App., 65 Pa. 314; Gallagher's App., 87 Pa. 200. This is not taking the property of one person and giving it to another; but is using subsequently acquired property of the estate, upon which the will does not operate, to pay that which the estate should have paid originally.

OPINION, MR. JUSTICE GREEN:

The contingency, upon the happening of which Pedro Salome was to have an interest in the estate of the testator, has actually occurred; and, if there is any part of the estate accessible to him, he should have it in accordance with the precise terms of the will, unless there is some very good reason for excluding him. That contingency is thus expressed in the will: "In the event of my dear wife outliving our child, Modesta, at my wife's death two thirds of the whole estate ($\frac{2}{3}$) is to be equally divided amongst my father and sisters then living, the remaining one third ($\frac{1}{3}$) to become the absolute property of my friend Pedro Salome or his heirs forever." The widow did outlive the child Modesta. The two thirds of the estate bequeathed to the father and sisters were released upon the payment to them of \$1,633.33, while Modesta was yet living. The money to pay that sum was taken from the body of the trust estate, and to that extent the principal of the estate has been diminished. By the election of the widow to take at law, and the birth of a posthumous child, each of them being entitled to one third part of the estate absolutely, two thirds of the estate are diverted from the operation of the will, and Salome's interest, if he has any, is but one third of a third, or one ninth of the whole. Two questions arise: first, is the remaining third of the estate to be treated as a part of the estate of the deceased, and subject to the operation of his will? and, second, is Salome entitled to be compensated out of this part of the estate, for his disappointment on account of the election of the widow?

Both appellants, being the widow and second child, claim that the share of Modesta was absolutely vested in her from the death of her father, and as such descended to them under the intestate law; and, if this be so, Modesta's share is not a part of the testator's estate, and is not subject to the operation

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of his will. But we are not able to take that view of the question. We think the learned court below was correct in holding that Modesta's interest was a vested estate, subject to be divested by her death before her mother. The positive and express provision of the will cannot be disregarded. Its meaning is perfectly free of doubt, and it is not necessary to invoke rules of construction, which are only intended for doubtful cases, in order to ascertain the intention of the testator. The language he has used fully expresses his meaning, and, by consequence, his intention. His wife did outlive Modesta; and, in that one event alone, he did direct that two thirds of his estate should be equally divided amongst his father and sisters, and the remaining one third should become the absolute property of his "friend Pedro Salome, or his heirs forever." An instance of this kind occurred in *McCall's App.*, 86 Pa. 254, where M. bequeathed a certain fund to her executors, in trust to pay the income to G. for life, and after his death to pay the income to W. until he attained the age of twenty-five years, and on his arriving at that age to pay to him the principal; but, if he should die before he reached that age, without wife or issue surviving him, then the principal was to go to the eldest child of P. The auditor, whose report was adopted by this court, thus described the interest of W.: "This is not merely a direction to pay; it is a direct gift to trustees upon certain trusts; and the words 'to pay,' are the usual words defining the duty of the trustee, and created an estate in George C. McCall for life, and a vested remainder in William C. McCall, subject to be divested upon his death before arriving at the age of twenty-five years." As William survived his age of twenty-five years, his estate became completely vested, but it was correctly described by the auditor as subject to be divested by his death before that time. Another instance of the same kind occurred in *Churchman's App.*, 22 W. N. 131, (not reported in State Reports,) in which the opinion of the Orphans' Court was adopted as reported in 20 W. N. 367. A testator by his will bequeathed property to his wife for life, and at her death bequeathed legacies which he directed should not take effect until after his wife's death. By a codicil he directed that, if any legatee should die during the wife's lifetime, his legacy should lapse into the residuary estate: Held,

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that the legatees took a vested interest, subject to be divested in the event of their deaths before the testator's wife. In *Montgomery v. Petriken*, 29 Pa. 118, LOWRIE, J., said: "The devise over to Robert and James after the death of William is in form a vested remainder, and we think it is so in substance. The estate is really granted to William for life, with remainder in fee to Robert and James, and it is only on condition that William shall recover his sanity that he is to have a fee, and then it is to be by defeating the fee previously granted to the others. Their fee is vested, subject to be defeated if ever the event contemplated should happen." Authorities to the same effect might be easily multiplied, but it is quite unnecessary. The question is too plain.

At the time of the original adjudication of the estate in 1880, the sum of \$1,633.33 was deducted from the amount awarded to the trustee, by consent of all parties, apparently, in order to purchase releases from the testator's father and sisters. Were they now interested, they would under the will be entitled to two thirds of the trust fund; but, having released their interests, and the releases having been obtained for the benefit of the estate, a fund arises which was not within the contemplation of the testator, and not provided for by his will. As the trust fund was diminished to that extent, and the appellee's interest in it remains, it is plain that his share of the fund contributed one third of the amount paid for the releases. The death of Modesta, before her mother and before attaining the age of twenty-five years, having returned into the estate her share of the fund, a fund is established accessible to the appellee to compensate him for the loss he sustained by the election of the widow. This equitable doctrine has been fully recognized and enforced in this state. Thus, in *Sandoe's App.*, 65 Pa. 314, we said: "The rule in equity treats the substituted devises and bequests to the wife as a trust in her for the benefit of the disappointed claimants, to the amount of their interest therein; and the court will assume jurisdiction to sequester the benefit intended for the refusing wife, in order to secure compensation to those whom her election disappoints." The same doctrine was also applied in *Gallagher's App.*, 87 Pa. 200.

It is argued on behalf of the daughter Benicia that, if we hold that the share of Modesta was lapsed and returned into the es-

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tate of her father, it descends to her under the intestate law, and no part of it can be appropriated to the compensation of the appellee for his loss by reason of the widow's election. But the estate given by the will to the widow was an estate for life in the whole of the decedent's property, and it is this interest of the widow under the will that is sequestrated for the use of the disappointed legatee. As that interest computed to the present time would have amounted, since the death of the testator in 1878, to twelve years' enjoyment of the income which the widow would have taken under the will, and to the further income for as many more years as she may live, it is obvious that her bequest would amount to much more than the sum decreed to the appellee. The fund in question, being a part of the estate of the testator undisposed of by his will, is liable, in the first instance, to sequestration for the benefit of the appellee as a disappointed legatee. If anything is left after this has been done, the rights of Benicia under the intestate law can be considered.

The decree of the Orphans' Court is affirmed,
and the appeals are dismissed, at the costs of
the appellant.

ESTATE OF JAMES DUNDAS, DECEASED.

APPEAL BY W. O. DUNDAS FROM THE ORPHANS' COURT OF
PHILADELPHIA COUNTY.

Argued March 27, 1890—Decided October 6, 1890.

[To be reported.]

1. A residuary legatee, the wife of one of the executors of the testator, in the absence of fraud, may purchase, through the medium of her husband, acting as her agent, the share of another residuary legatee; and, in such circumstances, the rule which prohibits a trustee from buying at his own sale has no application.
2. When a residuary legatee sold and conveyed his interest to the wife of one of the executors, at a price ascertained by an estimate made for the purpose by the executors, the fact that, through errors in and omission of data from such estimate, the price was fixed at much less than the share was really worth, will not necessarily invalidate the sale.

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3. If such errors and omissions were unintentional and honest mistakes, naturally arising from the peculiar state of the assets, and the sale was not tainted by any fraud, it will not be set aside, although the purchaser was represented in the transaction by her husband, and the seller relied entirely upon the statements of the executors.
4. At all events, even if such sale were voidable at the election of the seller, he must act with reasonable promptness in moving to have it set aside; and a delay in so moving for two years after the purchaser, learning of his dissatisfaction, offered to re-convey upon re-payment of the price, with interest, is such laches as works an estoppel.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 336 January Term 1889, Sup. Ct.; court below, No. 47 June Term 1878, O. C.

On April 15, 1871, William Oswald Dundas presented a petition, praying for a decree that a certain deed conveying and assigning to Agnes Dundas Lippincott, the interest of the petitioner as one of the residuary legatees of James Dundas, deceased, in the estate of said decedent, be set aside, upon the ground that said deed was obtained from the petitioner for an inadequate consideration, through misrepresentation, concealment and imposition, etc., and praying that the executors of the decedent's will be ordered to pay to the petitioner his full share of the estate, notwithstanding such conveyance thereof.

A citation having gone out against Agnes Dundas Lippincott and Joshua Lippincott, her husband, and the executors of the will of James Dundas, deceased, the respondents demurred to the petition, upon the ground of want of jurisdiction in the court. The Orphans' Court sustained the demurrer and dismissed the petition, directing, however, that the executors hold the share claimed by the petitioner properly invested, until the petitioner could be heard in a court of equity. On appeal to the Supreme Court, the decree was reversed, the demurrer overruled, and a procedendo awarded: Dundas's Est., 73 Pa. 474. Thereupon, the petition having been amended in some of its averments, and answered, and a replication to the answers having been filed, the court appointed *Mr. W. J. McElroy* auditor to take proof of the facts and circumstances set forth in the petition, and to report an account against the defendants if necessary.

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In the fall of 1877, after he had taken the testimony, Mr. McElroy died. The petitioner then filed a request for an issue to determine the question of fraud in procuring the conveyance of his interest from him. On June 29, 1878, the court refused the request for an issue, and appointed *Mr. Samuel C. Perkins* auditor, in the place of Mr. McElroy and with like instructions. While the matter was pending before Mr. Perkins, Joshua Lippincott died, having appointed Agnes Dundas Lippincott as his executrix, and by agreement of all parties, the record was amended by making the proper suggestion and substitution.

On February 5, 1887, the auditor filed his report, finding, in substance, the following facts:

James Dundas died July 4, 1865, having by his will, which was duly proved on July 10, 1865, divided his residuary estate into forty equal parts, devising and bequeathing five thereof to the children of William H. Dundas, deceased, in equal shares. As one of the four children of William H. Dundas, the petitioner was entitled to the one fourth of five fortieths, or one thirty-second, of the residuary estate under the will. The will also gave three fortieths of the residuary estate to the respondent Agnes D. Lippincott, sixteen fortieths to her son James D. Lippincott, and twelve fortieths to her daughter, Anna M. D. Lippincott. The testator appointed as his executors, Joshua Lippincott, Richard Smethurst and James D. Lippincott, conferring upon them a power to sell real estate, which as the Supreme Court decided, on an appeal from the Orphans' Court, in connection with the settlement of the first account of the executors, worked a conversion of the realty embraced in the residuary estate: Dundas's App., 64 Pa. 325.

At the time of the testator's death, the petitioner was between twenty-three and twenty-four years of age, and unmarried. He had no employment, had not been brought up to any kind of business, and was not familiar with book-keeping. He was residing on a farm near Washington, D. C., belonging to his three sisters and himself, and inherited from their parents. He was married September 21, 1865, and during the following winter he and his wife spent some time in Philadelphia. During his stay there, he consulted counsel as to the propriety of contesting the will of the testator, upon the ground of undue influence upon the testator, exercised by Mrs. Lippincott and her husband,

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but that idea was finally abandoned. In company with his counsel, Mr. Joseph T. Thomas, he went to the register's office and examined the inventory which had been filed there by the executors, and Mr. Thomas remarked to him that the assets were all appraised at the lowest figure, to save collateral inheritance tax. In interviews which he had with the executors, the petitioner made inquiries as to the probable value of his interest in the estate, but was informed that they were unable, as yet, to tell him what he would receive.

On January 6, 1866, the executors made a distribution of the income of the estate for the first six months, the petitioner receiving \$533.32 as his share thereof. Shortly before this he had applied to the executors for a loan of \$1,500 on the credit of his interest in the estate, but the executors declined to make it. At the time of this first distribution, however, Mrs. Agnes D. Lippincott lent him the \$1,500, taking a pledge of his interest in the estate as security for its re-payment. On July 6, 1866, the executors made a second distribution, in which the petitioner's share was \$4,932.27, and, after the deduction of the amount due to Mrs. Lippincott on account of the loan made to him, he received the remainder of his share in cash.

Soon after the second distribution, the petitioner, having previously consulted with his sisters, with counsel and with friends, upon the subject of making a sale of his interest in the estate, receiving advice adverse to the project, and having attempted, without success, to sell it to several persons, opened a correspondence on July 19, 1866, with Joshua Lippincott, one of the executors and the husband of Agnes D. Lippincott, in regard to such a sale, offering to accept from him whatever he might consider a fair valuation. Mr. Lippincott, on August 8, 1866, replied to the letter of July 19th that absence from home prevented him from receiving it until that date, and saying: "In regard to purchasing your interest in your uncle's estate, as an executor I cannot do so. The thirty-one fortieths however, if they could purchase the entire five fortieths owned by yourself and sisters, I should approve. After consulting with them in regard to the same, I will be pleased to hear further from you."

The thirty-one fortieths referred to in this letter were the interests owned by the wife, son and daughter of Mr. Lippin-

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cott. As the result of some further correspondence, the petitioner came to Philadelphia in October, 1866, and had an interview with Joshua Lippincott, who informed him that Mrs. Lippincott would take his share at its appraised value, and he agreed orally to sell it then at that value. A calculation, therefore prepared by Mr. Lippincott and Mr. Smethurst, was then exhibited to him, showing an estimated valuation of the estate as of October 6, 1866, and resulting in his one thirty-second share being valued at \$13,802.57, and, deducting the \$4,932.27 which he had received in July, 1866, there was left \$8,870.30. This calculation contained estimates made upon three different bases, and the valuation of \$13,802.57 was arrived at by taking the average of the three results. No copy of the calculation was furnished to the petitioner.

The journal of the estate, which contained the inventory and appraisements, including that for the collateral tax, the cash book, which contained the receipts of income and expenditures and disbursements, and the minute book, which contained statements of receipts and disbursements of principal and income, were shown and explained to petitioner as far as was possible in the not very long interview. It did not appear that the books were shown to him at any other time, or that he had any other opportunity to examine them. The ledger was not shown to him, nor the record or title-book of the real estate, in which all sales of property were entered. The actual receipts from sales of real and personal estate, all but one of which had been made prior to July 6, 1866, were not stated to petitioner, nor did the increase thereon, if any, enter into the calculations, although included in the first account of the executors afterwards filed. Petitioner made no inquiry from any one, except from Mr. Smethurst and Joshua Lippincott, as to the value of the estate or the particular items composing it. "The explanations and information given by Mr. Lippincott to the petitioner, seem to have been of a very general character, without referring in detail to the items. . . . So far as his testimony shows any reference to details, in his interviews with the petitioner, it was as to expenses and outlays, particularly the heavy expenses of the coal lands in Schuylkill county and the great cost of the mausoleum." "The petitioner, so far as the testimony shows, did not get any

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fuller or more detailed explanation or information from Mr. Smethurst." Mr. Smethurst was secretary of the trustees of the Pratt estate, and was thoroughly conversant with all the details of it. The testator's undivided one fourth interest in that estate was "valued exclusively by him," but the petitioner was afforded no information or explanation beyond that valuation. "Petitioner was not informed that in fact some, if not all, the stocks and securities in the inventory were then selling at higher prices." "No intimation even was given of any possible increase over the appraised values; but the expenses and necessary disbursements, and the unproductiveness of the properties were, according to Joshua Lippincott's own testimony, largely dwelt upon and emphasized both by himself and Mr. Smethurst in the information and explanation which was given to petitioner." "As regards the claims against the estate, ... the probable large amount of these, with some mention of detail, was specially pressed on the attention of the petitioner. There was not the same anxiety to make known to him either the actual increase on the items specified, or the possibility of any advance in the valuations of the items not actually disposed of."

After making the arrangement for the sale of his interest to Mrs. Lippincott, the petitioner returned home. Instructions were given by Mr. Lippincott and Mr. Smethurst to Mr. George W. Biddle, as counsel for Mrs. Lippincott, to have a proper deed drawn with all the necessary papers. Searches were ordered against petitioner, and the matter was in preparation. No time was fixed for the payment of the purchase money. The calculation was submitted to Mr. Biddle, who inquired of Mr. Smethurst if it was an "accurate one," and he replied that it "was a very liberal one."

By arrangement, the petitioner came to Philadelphia again on November 5, 1866, and the next morning went, with Mr. Lippincott, to the office of Mr. Biddle, who read to him the deed which had been prepared, and gave him instructions as to its execution by himself and wife. At that time, the petitioner executed a declaration, prepared and engrossed in Mr. Biddle's office, as follows:

"I have examined and considered the condition of the estate of the late James Dundas, and certain statements showing the

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present value thereof furnished to me by the executors, all information relating to the subject having been freely given to me by the executors of Mr. Dundas; and I am satisfied that a fair valuation of the whole residuary estate in which I am interested, including the principal of the annuities hereafter to fall in, is the sum of \$441,682.40, and upon this basis of valuation I have requested Mrs. Agnes Dundas Lippincott to purchase of me my one fourth part of five fortieths of said residuary estate, which she has agreed to do; and I am acting in this sale of my residuary estate with a full knowledge of my interest in said estate, and without any persuasion or influence of any kind. Witness my hand and seal this sixth day of November A. D. 1866.

“WILLIAM OSWALD DUNDAS. [L. s.]”

The deed recited the residuary clause of the will; the desire of the petitioner to sell his interest, present and expectant, in the testator's residuary estate; that for this purpose an appraisement thereof had been made by all the executors, submitted to and examined and approved by the petitioner; the agreement of Agnes D. Lippincott to purchase at the appraised valuation, a part of which had been already paid to the petitioner, viz., \$4,932.27; and it named, as the consideration of the conveyance, the residue of said appraised value, to wit, \$8,870.30.

On November 8, 1866, the petitioner brought back the deed duly executed, delivered it to Mr. Lippincott and received from him two checks drawn by Agnes D. Lippincott, one for \$8,870.30, the consideration mentioned in the deed, and the other for \$1,129.70, the two making together \$10,000. The second check was given to bring the amount up to \$10,000, which the petitioner had stated he was in urgent need of, for the purchase of a house in Baltimore, and Mr. Lippincott told him that this additional amount was paid on account of the regard Mrs. Lippincott entertained for his wife, and out of her own private means, as there was due to him from the estate only some \$8,000.

The petitioner had never seen Mrs. Lippincott prior to the delivery of the deed and the receipt of the money, in regard to the purchase by her of his interest in the estate, nor had she had any conversations with him on the subject. The whole

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matter was transacted through her husband, who acted for her and as her agent. She had never named any specific price, but on or about September 21, 1866, as testified by her husband, had come to the conclusion to buy the share of petitioner "at whatever price his share was estimated to be worth by a careful valuation made by the executors."

Of the money that he received for his interest, the petitioner spent about \$1,000 in paying debts, and \$5,500 on account of the purchase money of the Baltimore house. He paid afterwards for some additions he made to the house. The balance of the money he kept in bank, drawing upon it as his necessities required. About a year after he bought the house, he exchanged it for a smaller one and got some \$1,500 cash in the exchange. This house he rented for \$450 a year for about two years. He went into a building association, which advanced him money upon a mortgage of the property. He had gone to Baltimore to accept a situation in Adams Express Company, and, after being in their employ some time, lost the place owing to a curtailment of the force, and, being unable to keep up the dues to the building association, they sold the property under the mortgage and bought it in about the year 1869.

The earliest intimation of petitioner's dissatisfaction with the sale of his interest to Mrs. Lippincott was when he appeared before Mr. Drayton, the auditor upon the first account, in the latter part of December, 1868. On April 5, 1869, Mr. George W. Biddle, attorney for Mrs. Lippincott, wrote Messrs. Burton and Porter, as attorneys for William O. Dundas, stating that when he (Mr. Biddle) communicated what had taken place at the audit to Mrs. Lippincott, she pronounced the allegations as to the share of petitioner having been obtained at an inadequate price under some misrepresentation to be untrue; but that, not desiring a controversy upon the subject, she had authorized Mr. Biddle to say that if petitioner "would repay to her, with interest, what he had received, he might stand exactly where he had been before selling out his interest." Mr. Biddle further wrote that he had made the statement to Judge Porter early in the year, perhaps on two different occasions, and somewhat later to Mr. Burton, but that no reply to the offer had ever been received, and that as she did not wish the matter kept open indefinitely, Mrs. Lippincott requested him

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to state in writing, on her behalf, that "as she purchased this share out of regard to the memory of her uncle, under great persuasion from Mr. William O. Dundas, who had been unsuccessfully offering it for sale to various parties in this city, it will be agreeable to her to re-convey it to him with all its incidents, upon being repaid principal, interest and all expenses, provided this be done on or before the 20th inst."

On April 8th Mr. Burton wrote Mr. Biddle acknowledging the above communication as received on the 7th through Judge Porter, but declining to make any reply on Mr. Dundas's account, as he did not regard himself as his counsel. On April 9th Mr. Burton wrote petitioner enclosing the letter of Mr. Biddle with a copy of his own reply, "in order that you may understand our position in the matter." Mr. Burton's communication to petitioner, with its enclosures, was sent to him by mail, addressed to Baltimore, where he then lived, but owing to his absence in Washington, it did not reach him till April 23d, three days after the limit fixed for acceptance of the proposition. He did not reply to it in any way.

In the latter part of March, 1871, the petitioner's wife came to Philadelphia and had two or three interviews with Mrs. Lippincott, at one of which Mr. Lippincott was present, and an offer was made to Mrs. Lippincott by Mrs. Dundas, on the part of her husband, of \$12,650 in lieu of the money she had paid for his share. This offer was not accepted. Mr. Dundas had arranged to get the money to make the payment; but had not been in a position to repay at any time previous.

—The auditor went into an elaborate examination of the details of the calculations exhibited to the petitioner at the time he made the contract of sale, and, as a result of such examination, reported that there were large and numerous errors and omissions therein, which resulted in the appraisement of the petitioner's interest in the estate at a very inadequate valuation. He reported, also, that down to the date of the third account of the executors, July 4, 1875, they had realized from real and personal estate some \$336,000 over and above the valuations given in the inventory and appraisement of the estate. The largest item in this increase was an advance of over \$192,000 received upon the sale of the testator's interest in the Philadelphia & Mahanoy Coal Company, early in March, 1871. There was testi-

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mony tending to show that in 1866, in consequence of troubles between the coal company and the Philadelphia & Reading Railroad Company, the stock of the former was depressed, and that sales of it were made as low as \$37.50 per share by holders, but that in 1871, the management of the railroad and its policy having changed, the whole capital stock of the coal company was purchased by F. B. Gowen, president of the Philadelphia & Reading Railroad Company, for its benefit, at a large advance.

In 1871, pending the audit upon the second account of the executors, Mrs. Lippincott purchased the interests of the petitioner's sisters for \$20,000 each. It was shown that they had been carrying on litigation against the executors in connection with the settlement of the estate.

Having found the facts, in substance as above, the auditor reported further, in part, as follows:

The case presents features peculiar in itself: counsel on either side did not refer to, and the auditor has been unable to find, any one exactly parallel. Yet there are some facts in the case which present its leading features without dwelling upon the details, which are fully set forth in the findings of fact by the auditor. The sale was not by a trustee from himself of part of the assets of the trust estate, nor was it directly to a trustee by the cestui que trust; it was a purchase by one residuary legatee from another of the whole of a $\frac{1}{3}$ undivided share in the residue of an unsettled decedent's estate; but the purchaser was not only a co-residuary legatee, but was the wife of one of the executors, who acted as agent for her in the negotiations preliminary to the execution of the purchase, the purchaser herself taking little or no part in the matter beyond signing the checks for the money which was paid upon the execution of the deed of assignment of the share, and designating the consideration which she was willing to pay for the same, to wit, whatever it was estimated to be worth by a careful calculation to be made by the executors. . . .

The purchase of the share was made only a year and four months after the testator's death, and before the executors had settled and filed any account. The purchaser with her two children, one of whom, her son, was also an executor of the will, represented $\frac{1}{4}$ of the residuary estate. She and her hus-

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band were also entitled under the will each to an annuity of \$10,000, besides being recipients of sundry specific legacies comparatively of small values; and the son, also, received a specific legacy and the devise of a farm in Delaware, and of a place or farm in the First (now Twenty-sixth) ward in Philadelphia, of considerable value, adjoining the lands included in the residuary estate.

The sale was not in any sense at the solicitation of the purchaser. The seller was anxious to realize upon his share of the estate without awaiting its settlement. . . . No price was ever set by the seller, nor was any valuation ever fixed or even suggested by him or on his behalf, upon his interest. Nor was any specific examination made by or for him into the condition and value of the estate, with a view to this particular proposed sale; nor did he consult counsel or have independent advice in respect to it as to values, for which he relied upon the estimates and calculations prepared by the executors, with whatever light he may have had from such information as he had gleaned from previous inquiry made without special reference to this sale, and his looking at the books of the estate for a short time when shown to him by the executors just prior to the sale. His reliance, however, was upon the representations of the executors, which were urged by them as correctly exhibiting the condition and value of the estate and of his interest in the residue thereof, which they, as executors, undertook for the purchaser to fairly represent to the seller; and by reason of this confidence, to quote the language of Lord Chancellor THURLOW, in *Fox v. Macreth*, 2 Cox 327, "to be sure, it makes fully as strong a case as that of a trustee."

The representation of the value of the estate, and the interest therein proposed to be sold, the auditor finds was incorrect in the premises upon which the estimate of value was founded, and in the methods through which the resultant estimate was reached. While the facts as above reported fully justify this finding, yet the important question remains, was this incorrectness through fraud or mistake? Fraud must be proved, and not assumed or lightly to be inferred; and very great latitude is allowed in the introduction of facts in proof of its allegation in any case.

The auditor, however, after a most thorough and careful and

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repeated examination and consideration of the actual and absolute or naked facts of the case, which covered a very wide range, cannot find that there was in this incorrect representation and valuation, fraud upon the part of the executors, who had thus placed themselves in such a relation of confidence to the seller. The auditor finds as a fact that this representation of the condition of the estate, and of the value thereof and of the seller's interest therein, was incorrect, but that it was not fraudulent. It was a mistake, and such a mistake as would not unnaturally arise from the peculiar character of the assets of the estate, and its complicated nature, and the complex relations of all the parties concerned. The auditor is of opinion, and so finds, that, however mistaken the executors were, yet they honestly believed that the representations they made to the seller, the petitioner, were correct and fair for the purposes in view.

But, even when on a purchase by a trustee for sale from his cestui que trust, he may have given an adequate price and gained no advantage, it will be set aside at the option of the cestui que trust, unless the connection between them most satisfactorily appears to have been dissolved, and unless all knowledge of the value of the property acquired by the trustee has been communicated to this cestui que trust. . . .

—Citing *Fox v. Macrèth*, 2 Cox 327; *Ex parte Bennett*, 10 Ves. 381, 400; *Randall v. Errington*, 10 Ves. 423; *Hill on Trustees*, 156–159, 537, and *Delamater's Est.*, 1 Wh. 362, the auditor continued:

The auditor is of the opinion, in view of all the facts found and of the principles of law indicated, that the present case is one which entitles the petitioner to relief in equity, by setting aside the sale of his interest in the residuary estate of James Dundas, deceased, and the deed which he executed and delivered therefor, November 7, 1866, to Mrs. Agnes D. Lippincott; and that he be admitted to claim against the estate for his interest therein under the residuary clause of the will, subject to proper credits for all the moneys he has actually received either from the estate itself or from the purchaser of his share, provided that he is not barred by laches.

—Considering *Ashhurst's App.*, 60 Pa. 290; *Evans v. Borie*, 3 W. N. 36; *Evans's App.*, 81 Pa. 278, 294, 295; the auditor concluded:

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Aside from any question of trust, though the language of Lord Chancellor THURLOW, as cited above from *Fox v. Macreth*, would justify the holding of the "confidence" of the seller in the purchaser to be "as strong as any trust," yet here is a proceeding to set aside a transaction after a lapse of the interval from November 7, 1866, the date of the deed, to April 15, 1871, the date of filing the petition, a period of but four years and five months, and the facts do not show any reason in the judgment of the auditor for departing from the general rule laid down in *Ashhurst's Appeal*, that six years is necessary to a bar to a claim to set such a transaction aside. The seller, in the present case, certainly did object at least as early as December, 1868, about two years after the transaction, and he objected also subsequently more than once. His objection was known to the purchaser certainly with sufficient distinctness to prevent any dealing with the property transferred in a manner inconsistent with any trust or confidence. There is no evidence, indeed, of any dealing by the purchaser with this undivided interest in any way particularly or specifically prior to the filing of the petition. She had received no part of the property upon the distribution under the auditor's report on the first account, for the dividend to petitioner's share was not quite equal to what he had already received. The relative position of the parties had not been changed in the interval of time before the petition was filed. The practical question of relief sought and the manner in which it can be afforded is reduced to a mere arithmetical calculation with proper adjustment of interest.

The auditor accordingly finds that the petitioner's claim is not barred by any laches in seeking to have the transaction set aside, and that he is entitled to relief in the form above mentioned; and consequently an account is necessary to be stated, and is as follows, the executors' accounts as filed being taken as the basis, as the auditor does not deem it necessary to enter upon the questions of disallowance and surcharge, which were contested upon these several accounts:

—The auditor then stated an account, finding that there was due to the petitioner from the estate a balance of \$10,393.44 as of date July 5, 1875, with interest thereon; that the petitioner would be entitled further to receive his share of the net income

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of the estate after July 5, 1875, and of the principal of the estate remaining undistributed, when further accounts should be filed by the executors; and that the costs of the proceeding should be paid by Mrs. Lippincott.

Exceptions to the report upon the part of both the petitioner and the respondents were filed with and overruled by the auditor, and afterwards renewed before the court. Among the exceptions of the petitioner, was one complaining of error in not finding that the valuation made of the petitioner's interest was fraudulent, and that the deed for the sale of his interest was procured by misrepresentation, concealment and imposition, practiced by the executors.²³ After argument, the court dismissed the petitioner's exceptions, and sustained the exceptions filed by the respondents, in the following opinion by ASHMAN, J.:

This case may be said to have attained to the dignity of old age. It has outlived two of the judges before whom the petition first came, the master to whom it was originally committed, and the principal co-respondent; and its accumulated evidence is now collated in a report which contains more and minuter subdivisions than one of Chillingworth's sermons. Yet it presents the single question whether the sale by the petitioner of his interest in the decedent's estate is open to the charge of mistake or fraud.

The starting point in this investigation is the attitude which the bargaining parties assumed to each other. Manifestly the same facts will bear one interpretation where easy credulity is at the mercy of acute and practiced cunning, and another and different interpretation where each side is pitted against its antagonist and relies upon its own shrewdness to secure the advantage. Counsel did not overlook this consideration. With a vividness of coloring which did credit to the eloquence of the advocate, but was not so flattering either to the intellect or morals of the client, the petitioner was pictured as a wholly illiterate youth, who united to the shiftlessness of a spendthrift the profligacy of a debauchee, and who was so impoverished by his excesses that he was eager to sell his inheritance at any sacrifice. He was described, somewhat incongruously, as a country bumpkin, a Mulberry Sellers, and a Prodigal Son. Happily for his future, the hero of these titles failed to exhibit in his

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private life the character which had been assigned to him in fiction. He was rather remarkable for his industry and acumen. He drove an express wagon at one time, and was then promoted to a clerkship; and after marrying an estimable woman, he purchased a home for her with the first moneys he received from the estate. He had even a surplus for charity; and he piously declared that the seed which he had scattered in that field had yielded a hundredfold. These deeds of beneficence and this providence of resources, rather than his poverty, were the arguments he plied with those whom he solicited as purchasers. His overtures for the sale of his interest were made, too, only after he had sought the advice of counsel here and elsewhere, all of whom attempted to dissuade him from his purpose, and after an unsuccessful effort to annul the will of the testator; and his receipt, when the sale was consummated and the money paid over, was accompanied with the declaration that he had acted in the transaction with a full knowledge of his interest in the estate, and without any persuasion or influence of any kind whatever. This summary, based upon a careful study of all the evidence, enables us to say with emphasis [that the parties to the sale stood at arms' length, and were in law equally matched.]³

We do not overlook in this assertion that the estate of which this interest was part, included in it assets whose character was so speculative that only those who, like the respondents, were familiar with their history, could form a reliable judgment as to their values; nor that the accounts of the estate were so complicated that no scrutiny on the part of the petitioner would have given him a clue to their meaning. Nor do we forget that his inspection of those accounts was a matter of the merest form. But it was an inspection of his own devising; he could have employed experts and he could have consulted counsel. Neither of these aids could have been furnished by the respondents, for the obvious reason that both expert and counsel would have been their agents, and, theoretically, at least, hostile to the petitioner. What took place before the sale is as significant as anything which followed it. The petitioner was in the market; he had importuned his relatives and strangers to buy; in the language of more than one witness, he had hawked his wares about town. The respondents, so far from bidding for his interest, repulsed his proposals. To adopt the words of the Mas-

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ter of the Rolls, in *Moth v. Atwood*, 5 Ves. 845, the petitioner "was determined to sell this reversion, and if the law will not prevent a man from selling, it would be too much for a court of equity to say any bargain upon the subject will be bad. . . . It is clearly admitted it was offered over and over, to all the town, to twenty persons. That circumstance is decisive, and would alone be sufficient to dismiss a bill brought at the distance of twelve years from the transaction. This man (respondent) was not going about, or lying by, to avail himself of an opportunity to get a good bargain." It is important to notice, also, that the petitioner was not exposing for sale an expectant interest, as was erroneously stated at the argument; his interest was vested, and therefore not within the rule which annuls a contract with an heir for mere inadequacy of price: *Davidson v. Little*, 22 Pa. 252. The respondents have this moral advantage, that in all their verbal declarations to the petitioner they never under-estimated his prospects in the estate. He was told by the husband of the purchaser that he would be amply provided for through his legacy; and his wife was told by the purchaser that his interest would amount to \$50,000. If, in the face of these statements, he deliberately waived all inquiry, and accepted \$15,000 as the price of his portion, he can offer no plea for relief which will avail him, except fraud, or mistake which was tantamount in its effects to fraud.

The master finds that there was no fraud. But he reports that there were certain errors in the calculation of values, which we must assume, upon his hypothesis of innocence, were accidents which so vitiated the result as to absolve the petitioner from his contract, and relegate him to his original estate. The finding of the master upon this point must command attention. He appears to have taken six years, dating from the close of the hearings before him, to reach his opinion, and the result of that profound study is thus given:

"The auditor finds as a fact, that the representation of the condition of the estate, and of the value thereof, and of the seller's interest therein, was incorrect, but that it was not fraudulent. It was a mistake, and such a mistake as would not unnaturally arise from the peculiar character of the assets of the estate and its complicated nature, and the complex relations of all the parties concerned. The auditor is of opinion,

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and so finds, that, however mistaken the executors were, yet they honestly believed that the representations they made to the seller, the petitioner, were correct and fair for the purposes in view."

To state the case more plainly, the master has imposed upon an arithmetical blunder the severest penalty which is ever inflicted upon a patent fraud. He says that *Fox v. Macreth*, 1 Lead. Cas. in Eq. 92, 2d ed., sustains him. We do not see the force of the reference. The trustee in that case bought from himself, under a special confidence which he abused, and before the completion of his contract, resold at a large profit. Lord ELDON, in indorsing the judgment which was rendered, and declaring that a purchase by a trustee, even for an adequate price, will be set aside, excepts the case in which all knowledge of the value of the property acquired by the trustee, has been communicated to the cestui que trust. He says: "The rule I take to be this: not that a trustee cannot buy from his cestui que trust, but that he shall not buy from himself. If a trustee will so deal with his cestui que trust that the amount of the transaction shall shake off the obligation that attaches upon him as trustee, then he may buy:" Ex parte Lacey, 6 Ves. 625. [The present is the case of the sale by one cestui que trust to another, to which the trustee was not a party, and in which he acted by consent of the seller and buyer, as the agent of both.]⁷ His mistake, unless caused by the party who is benefited, cannot avoid the contract.

This leads us to examine the nature of the alleged errors. We shall go into no labored detail; to do so would require us to transpose bodily into the opinion the elaborate calculations which cover many pages of the master's report. We have indeed a grave doubt as to their pertinency to this issue, and a grave doubt, therefore, whether we should discuss them at all. For the fact that calculations, minute even to abstruseness, were needed to make out the prima facies of the petitioner's claim, is some proof that his claim is of very uncertain tenure. He had agreed to sell, and the co-respondent to purchase, at a price to be fixed by an appraisement. Both parties, therefore, threw themselves upon the judgment of the valuers of the estate; and, as that judgment, in common with all things human, was fallible, they agreed to accept it with its fallibili-

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ties. The judgment of those appraisers might differ, and it almost certainly would differ, in a matter so intricate, from the judgment of any other set of appraisers, however appointed; it might even differ, as it seems to have differed, from that of the master; but it was, nevertheless, the controlling judgment, because it was rendered by the umpire whom the parties in interest had selected.

We have nothing to do with the wisdom or unwisdom of this arrangement; we are prohibited even from passing upon its reasonableness. To quote from LOWRIE, J.: "We cannot set up our reason, or the public reason, for that of the contracting parties, and make a contract for them that is contrary to their plain intention, without violating the first principles of freedom, and the very nature of contract relations:" *Nelson v. Von Bonnhorst*, 29 Pa. 355. The rule thus formulated was reiterated in *Singerly v. Thayer*, 108 Pa. 291, and *Krum v. Mersher*, 116 Pa. 17. Suppose it was unwise and unreasonable in the *cestuis que trust* to name the trustees as their umpire? They had, nevertheless, a right to select those gentlemen, and by the very act of selection, they canceled, as to this transaction, all fiduciary relations. This, at least, is precisely the reasoning of Lord ELDON, in *Ex parte Lacey*, *supra*. He says: "The rule is this: A trustee who is entrusted to sell and manage for others, undertakes, in the same moment in which he becomes a trustee, not to manage for the benefit and advantage of himself. It does not preclude a new contract with those who have entrusted him. It does not preclude him from bargaining that he will no longer act as a trustee. The *cestuis que trust* may, by a new contract, dismiss him from that character." Apply this rule here. The trustees by the voluntary choice of the *cestuis que trust* became the agents of the latter to carry out the sale. Can it be possible that any mistake, short of fraud, of those agents, can, after the sale has been perfected, and the consideration has been paid, work a dissolution of the bargain? Or, reverse the places of the contending parties: suppose the appraisers had over-valued the estate; could the purchaser ask for a rescission of the contract because she had paid too much?

Passing this, however, the error which was most insisted on, because it lay directly on the surface, was the omission from

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the inventory of the profit which had been realized over appraised values, from the sales of certain pieces of real estate. It was alleged that the petitioner knew nothing of any of these sales, and we accept, for the purposes of the argument, although against every doctrine of probabilities, that the statement was true. But his proposal was to sell at the appraisement; and a new element is now sought to be injected into the proposal, by adding subsequent profits to existing valuations. This proposition, however, contradicts the definition of an appraisement, that it is a mean between prospective profits and prospective losses. Tested by the alternative of a sale resulting in a loss, its fallacy is at once apparent. Certainly, if a loss had occurred, the price under the contract would have remained unchanged, because that price had been fixed by the inventory, and because the risk, both of loss and gain, had been assumed by the buyer. If, then, the seller could not be affected by a loss, why should he claim to be benefited by a profit?

The master reports, as another error, the difference between the valuation of the testator's interest in the Pratt estate, \$102,375, and its previous assessment for the collateral inheritance and succession taxes, at \$120,000. He also finds that the gross and not the net amount of the taxes was deducted from the total inventoried value of the estate, thereby making an under-estimate of \$2,217.08. He names other errors which are not patent, and would require great space to particularize. If we assume that the differences which have been pointed out, and the profits upon the sales, which last were fixed at \$63,476.74, should have appeared in the estimate furnished by the trustees, the petitioner would have been entitled to \$1,630.30 in excess of what was actually paid him as the value of his legacy. It is a material circumstance in this connection, that the appraisement upon which the trustees proceeded was the original inventory of the estate, and that the items in abatement which were intended to reach the present worth of the property, were not fixed solely by the husband of the purchaser. He was assisted throughout the work by his co-executor, a gentleman of acknowledged eminence as a conveyancer, who was also the secretary of the trustees of the Pratt estate, and who had no interest in the transactions with the petitioner. Attached to the appraisement were two exhibits,

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prepared by the trustees, showing the average income of the estate for one year and for five years respectively, and the estimated principal which would be required to produce that income. These schedules were apparently designed to verify the accuracy of the appraisement. They were made the subject of extended comment and laborious ciphering by the master; but as the settlement, under the agreement between the parties, was based upon the appraisement, it is to that paper alone that the limits of this opinion will permit a reference. The masses of figures which the master has drawn from the accounts filed by the executors at dates succeeding the sale in question will also be passed over, for the reason that they are applicable only in case the petitioner shall be reinstated as legatee, and were mainly introduced to show the value of his interest as such legatee at the date of the last account, July 5, 1875.

We are justified in dropping the discussion at this point, because there is another consideration which appears to be conclusive. The sale was completed November 7, 1866, and the first intimation that the petitioner intended to take steps to set it aside was given in December, 1868. In April of the following year, the purchaser notified the petitioner in writing, as she had in the interval verbally notified his counsel, that on re-payment of the purchase-money she would cancel and return his conveyance. Through no fault of either party, the petitioner failed to receive the communication until after the time for re-payment had passed. But he made no effort to secure a longer time; he simply did nothing. It is our belief that the day of grace closed at that moment, and closed by his own choice. We may safely discard the reasons we have heretofore urged, and standing upon this one circumstance, affirm that, whatever other remedy may be within his reach, the remedy proposed by the master, through a rescission of the contract, is not open to the petitioner. If the silence of a party, after notice that a contract has been made in his name by a mere volunteer, will be accepted as proof that he has ratified the contract, as in *Phila. etc. R. Co. v. Cowell*, 28 Pa. 329, or in *Fellowsby v. Kilrit*, 17 Ill. 522, certainly silence after an offer to rescind from a party competent to make it, will be held to mean that the contract is to continue. It is impossible that,

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where no new reason has arisen, a sale shall be set aside at the instance of one who declined eighteen years ago an invitation extended in good faith to receive back what he had sold.

The master seems to have confounded the distinction between void and voidable contracts. This agreement could not have been void, because he has expressly found that it was free from fraud. If we admit that the petitioner was not bound by it, we must also admit that he was not bound to reject it, and that when he refused to reject it, he confirmed it. He may sue for damages for the fraud, if there is any, but his suit is a confirmation of the contract: *Pearsoll v. Chapin*, 44 Pa. 14. The master's benignant ruling permits the petitioner to use the money he acquired under the purchase as his own, to reject the offer for a rescission of the sale, and to come in at last as if no sale had been made. See further as to this distinction and as to purchases by trustees, *Beeson v. Beeson*, 9 Pa. 279; *Lazarus v. Bryson*, 3 Binn. 54; *Painter v. Henderson*, 7 Pa. 48; *Musselman v. Eshleman*, 10 Pa. 394; *Campbell v. Walker*, 5 Ves. 678. We may add, just here, that the executors were bound to carry out the wishes of the cestuis que trust, and that hence, as to the respondents, the sale was a forced one. They could buy at such a sale without even the imputation of fraud: *Fisk v. Sarber*, 6 W. & S. 18.

This, in our judgment, disposes of the decree which the master has indicated as proper. Upon the only other question which can be raised we are equally clear. The petitioner is not entitled to recover for the diminution in the price of his interest, which may have been worked by any errors in the appraisalment from which that price was made up. If the reasons which we have endeavored to set out are inadequate to this conclusion, that in an estate of such intricacy no appraisements could be demonstrably correct, and that no two appraisements could be alike, and that in adopting this standard of values the contracting parties waived all errors which were untainted by fraud, a final reason presents itself in the doctrine of laches.

That doctrine, which is not limited in its scope by any forced analogy to the statute of limitations: *Evans' App.*, 81 Pa. 278, has a two-fold purpose. It is intended as a check to litigation, and as a test of the good faith of a litigant. The presumption

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against the party who sleeps upon his claim, is not only that the claim never existed, but that the claimant never believed in its existence. The case of the petitioner may be fairly judged by this criterion. With his instinct for litigation fully alive, he delayed the formal assertion of his rights until nearly five years after the bargain which he repented of had been executed. The inducement to this tardy controversy was that his sisters received for their shares a larger consideration than his own share had yielded him. No sane mind would accept the conclusion that an increase of price in the second sale was, in itself, proof that fraud had been perpetrated in the first sale. The evidence was positive, however, that, in the interval, market prices had risen, and a profitable sale had been effected under exceptional circumstances; and that, in addition to these incidents, a desire to end a vexatious contest had induced the purchasers to advance upon their bids. In the hope of securing a part of the profits which neither he nor any one else had anticipated, he embarked upon what may be emphatically called a cruise of discovery; at his call, week after week, books and papers were transported by cart loads to the office of the master; and years of patient effort on the part of that officer and of counsel have unearthed errors, untouched, as the master reports, by the suggestion of fraud, whose aggregate falls far short of the expense of this inquiry. In the light of these events, the letter of the petitioner, in which he first announced to the respondents his purpose to sell, seems to have been prophetic. It concluded thus: "I hope my dear sir, you will make me a proposition similar to the heirs in West Virginia, as you have signified your intention to buy their shares. As regards not allowing me enough, and my saying in after time I did not receive its proper value, all I can say is, that I have too much confidence in you as a high-toned gentleman, and am willing to accept whatever you consider a fair value." When we recall the fact, that just before the date of that letter, its author had secretly striven to destroy the legacy given to the person whom he addressed by these courtly epithets, and that, some years after its date, he evinced his gratitude and his confidence by charging that person with fraud, we do not fully appreciate the pathos with which counsel for the petitioner insisted that the wrong of which he complains

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was invited on his part by the artless innocence which suspects no evil.

Counsel for the purchaser agreed that certain errors, which are not now specified, should be the subject of an allowance to the petitioner, and the present decree will be entered subject to that agreement.

The exceptions of the respondents are sustained, and the petition is dismissed.¹

A formal decree reversing and setting aside the conclusions and findings of law of the auditor, and dismissing the petition at the cost of the petitioner, was signed on April 7, 1888. Applications for a re-argument and for amendment of the decree were subsequently refused; whereupon, the petitioner took this appeal, specifying that the court erred:

1. In entering the decree dismissing the petition.¹
- 3, 7. In making the findings embraced in []^{3 7}
17. In finding that the petitioner was barred by laches.
23. In dismissing the petitioner's exception as to the question of fraud.²³

Mr. Arthur M. Burton and *Mr. Daniel Dougherty*, for the appellant:

1. The court erred in finding that the parties to the sale stood at arm's length and were in law equally matched. This is the case of a sale of an undivided interest in an estate by a cestui que trust, a young man without means, without employment, without any knowledge of business, and ignorant of values, to the wife of the trustee, at a valuation previously made by her husband and his co-trustees, as to which the vendor had no independent advice or counsel, the executors failing to communicate to him information which they had, and the valuation made by them proving to be incorrect and greatly below the actual value, even on the basis upon which it was made. The actual dealing was between the cestui que trust and his trustee, and prima facie, such a purchase by a trustee cannot stand: *Spencer's App.*, 80 Pa. 317. And the rule is the same whether the trustee buys for himself or for a third party: *Huguenin v. Baseley*, 14 Ves. 273; *Gordon v. McCarty*, 3 Wh. 407; *Dundas's App.*, 64 Pa. 325. While it is not con-

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tended that an executor or his wife may not buy, it is necessary that there be affirmative proof of the fairness of the transaction: *Gibson v. Jeyes*, 6 Ves. 266; *Shea's App.*, 121 Pa. 320.

2. That the appellant, instead of employing experts to examine the accounts and calculations, and consulting counsel, chose to place confidence in the representations of the executor, is no answer to his complaint that such confidence was abused: *Redgrave v. Hurd*, L. R. 20 Ch. D. 121; *Hunt v. Moore*, 2 Pa. 107. Clearly, *Davidson v. Little*, 22 Pa. 252, cited by the court below, is not authority for holding that the present case is an exception to the rule which annuls a purchase of an expectant interest from an heir, for mere inadequacy of price. In this case, moreover, the appellant could sell only to a person whom the executors would favor; no outside party could get the information on which to bid. But the rule is applicable to sales of vested estates in remainder and reversion, and also to estates in possession: 1 *Story's Eq. J.*, §§ 335, 337; *Aylesford v. Morris*, L. R. 8 Ch. App. 484; *Haygarth v. Wearing*, L. R. 12 Eq. C. 319; *Fry v. Lane*, L. R. 40 Ch. D. 312. The vital question is, whether the executors fully performed their duty by giving the appellant all the information they possessed, and the findings of the auditor, which show that they did not do so, and which were not excepted to, should be conclusive on the court: *Scheppers' App.*, 125 Pa. 598; *Morgan's App.*, 125 Pa. 561.

3. The court erred in finding that the trustee was not a party to the contract, but acted by consent as the agent of both parties. If he did so act, however, the contract is voidable on that account: *Story on Agency*, § 211; *New York etc. Ins. Co. v. Insurance Co.*, 20 Barb. 470; s. c. 14 N. Y. 85; *Utica Ins. Co. v. Insurance Co.*, 17 Barb. 132; *Florance v. Adams*, 2 Rob. (La.) 556 (38 Am. Dec. 226). The court erred, also, in disregarding the finding of the auditor that the value of his interest was incorrectly represented to the appellant. The auditor's conclusion that there was a relation of confidence in this case, which bound the executors to exhibit the truth as it existed, was correct: 1 *Perry on Trusts*, § 179; *Babcock v. Case*, 61 Pa. 427. Equity relieves even from the mistakes of a third person: *Jenks v. Fritz*, 7 W. & S. 201. But the auditor's conclusion that the misrepresentation in this case was

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mistaken, without being fraudulent, is not in accordance with the facts reported by him. Fraud does not necessarily mean deceit and circumvention; it includes all acts, omissions and concealments which involve a breach of a legal or equitable duty, or of a trust or confidence justly reposed: 1 Story's Eq. J., §§ 171, 187; Aylesford v. Morris, L. R. 8 Ch. App. 484; Moxon v. Payne, L. R. 8 Ch. App. 881; Evans v. Llewellyn, 1 Cox Ch. 332; Tyson v. Passmore, 2 Pa. 124; Bennett v. Judson, 21 N. Y. 238.

4. The absence of wilful fraud will not relieve one who misrepresents, and thereby obtains an unjust advantage: McCall v. Davis, 56 Pa. 431; Doggett v. Emerson, 3 Story 700. In this case, the principal elements of fraud are made to appear, and the inference of fraud necessarily follows. The manner in which the mistakes occurred not being explained, they cannot be treated as mere accidents, especially in view of their number and magnitude. A *prima facie* case of fraud was made out: Griswold v. Gebbie, 126 Pa. 353. But if the misstatements were mere mistakes, to claim the benefit of them is fraud, and is sufficient ground to set aside the conveyance: 1 Perry on Trusts, § 172; 1 Story on Cont., § 621; Elwell v. Chamberlain, 31 N. Y. 611. The conclusion of the court that by not replying to the offer of Mrs. Lippincott, which he failed to receive until after the time limited for its acceptance had passed, the appellant acquiesced in the contract of sale as originally made, is erroneous: Phila. etc. R. Co. v. Cowell, 28 Pa. 329; Thompson's App., 103 Pa. 603; De Bussche v. Alt, L. R. 8 Ch. D. 286; Phillipson v. Gatty, 7 Hare 516. Nor is he barred by laches: Gowland v. De Faria, 17 Ves. 20; Hill v. Epley, 31 Pa. 334; Beaupland v. McKeen, 28 Pa. 124; Kilbourn v. Sunderland, 130 U. S. 505; Evans's App., 81 Pa. 301; Byrne v. Frere, 2 Moll. Ch. 171; 2 Perry on Trusts, § 867; Price's App., 54 Pa. 479; Ferris v. Henderson, 12 Pa. 54; Daggers v. Van Dyck, 37 N. J. Eq. 130; Lewin on Trusts, *874; Wollaston v. Tribe, L. R. 9 Eq. 44; Murray v. Palmer, 2 Sch. & Lef. 474; 1 Perry on Trusts, § 230; Morse v. Hill, 136 Mass. 66; George's App., 12 Pa. 260; Johnson's App., 114 Pa. 140.

Mr. John G. Johnson and Mr. George W. Biddle (with them Mr. John J. Wilkinson), for the appellees:

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The questions raised by this appeal may be reduced to two very simple ones :

1. Can a residuary legatee, being the wife of an executor of an estate, purchase the share of another residuary legatee through the medium of her husband, in the absence of fraud ; or, does the rule which forbids a trustee from buying at his own sale, apply to such a case and render the sale voidable at the will of the vendor ? The authorities support the affirmative of the first alternative, and show that there is nothing in this case to take it out of that rule : *Ex parte Lacey*, 6 Ves. 626 ; *Barwell v. Barwell*, 34 Beav. 371 ; *Fox v. Macreth*, 2 Cox 827 (1 Lead. Cas. in Eq. 115) ; *Coles v. Trecothick*, 9 Ves. 245 ; *Graves v. Waterman*, 63 N. Y. 657 ; *Binney's App.*, 116 Pa. 169 ; *Delamater's Est.*, 1 Wh. 362 ; *Smith's App.*, 115 Pa. 319 ; *Morse v. Royal*, 12 Ves. 355 ; *Moth v. Atwood*, 5 Ves. 845.

2. If such a sale is voidable, is not the vendor estopped from seeking to set it aside after an offer to re-convey to him, upon re-payment of the price, with interest, has been made to but not accepted by him, and after he subsequently allowed the matter to rest for two years without moving to have the sale set aside ? Even when the sale is forbidden by the policy of the law, an attempt to set it aside must fail unless made within a reasonable time, and less than six years may be an unreasonable time ; *Evans v. Borie*, 81 Pa. 278 ; *Ashhurst's App.*, 60 Pa. 315 ; *Clegg v. Edmundson*, 8 Jur., N. S., 299. After an offer to cancel the sale, a further delay of two years is altogether inadmissible, especially when there has been a subsequent accidental rise in the value of the estate. The rise and fall of values cannot thus be speculated upon.

OPINION, MR. JUSTICE STERRETT :

Appellant claims under the will of James Dundas, deceased, proved July 10, 1865, in which the testator directed his residuary estate to be divided into forty equal parts or shares, five of which he gave to the four children of William H. Dundas, one of whom is appellant. He thus became entitled to one fourth of five fortieths, or one thirty-second of said residuary estate. On September 9, 1865, an inventory and appraisement of the estate was duly made and filed in the register's office. In January, 1866, appellant, then about twenty-four years of age,

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received from Mrs. Lippincott, another of the residuary legatees, \$1,500, in anticipation of distribution. Out of the first distribution of income, made about six months after testator's decease, he received his share, \$533.32, and out of the next distribution made six months later, he received nearly \$5,000.

Appellant's first thought, almost immediately after testator's death, appears to have been to attack and set aside the will, on the ground of undue influence exercised by one of the appellees and her husband. Eminent counsel were consulted as to the propriety of that course, but it does not appear to have been encouraged. Having abandoned the idea of contesting the will, he then consulted several others in regard to the propriety of selling his interest in the residuary estate, and in that connection he and one of his legal advisers, in 1865, examined the inventory and appraisement. At that time, his attorney informed him that the assets of the estate were appraised at the lowest figure to save collateral inheritance tax. On several occasions he was advised not to sell, but notwithstanding that advice, and the reasons suggested in support of it, he persisted in endeavoring to find a purchaser. Shortly after he received his share of the second distribution, in July, 1866, he wrote to Mr. Joshua Lippincott, one of the executors, proposing a sale to him. In that letter, referring to a suggestion that had been made by his sister, he said: "As regards not allowing me enough, and saying in aftertime that I did not receive its proper value, all I can say is, that I have too much confidence in you as a high-toned gentleman, and am willing to accept whatever you consider a fair valuation." In his reply, Mr. Lippincott emphatically declined to entertain the proposition to purchase, giving as a reason therefor, that being an executor he could not do so. He suggested, however, that appellant might sell his interest to others who were entitled to participate in the estate. As the result of that correspondence, one or two visits to Philadelphia, and conferences with the executors, etc., appellant arranged to sell his remaining interest to Mrs. Lippincott, wife of one of the executors, and also a residuary legatee.

Under the will she was entitled to three fortieths, and her two children together to twenty-eight fortieths, thus making the holding of the family more than three fourths of the resid-

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uary estate. A number of interviews and conferences had previously taken place between appellant and Mr. Smethhurst and Mr. Lippincott, two of the executors, in regard to the value of the estate, which finally culminated in a calculation prepared by the executors upon three different bases. This was submitted to appellant and was finally agreed to by him. The sale was consummated early in November, 1866, and the consideration, \$10,000, paid by Mrs. Lippincott out of her private estate. At that time, appellant expressed himself as fully satisfied with the transaction. This is evidenced by his written declaration delivered to the purchaser with his deed. In that he says: "I have examined and considered the condition of the estate of the late James Dundas, and certain statements showing the present value thereof furnished to me by the executors, all information relating to the subject having been freely given me by the executors of James Dundas, and I am satisfied that a fair valuation of the whole residuary estate in which I am interested, including the principal of the annuities hereafter to fall in, is the sum of \$441,682.40, and upon this basis I have requested Mrs. Agnes Dundas Lippincott to purchase of me my one fourth of five fortieths of said residuary estate, which she has agreed to do, and I am acting in this sale of my residuary estate with a full knowledge of my interest in said estate, and without any persuasion or influence of any kind."

The first intimation of any dissatisfaction with the sale of his interest to Mrs. Lippincott, was given to her counsel in December, 1868, when appellant and his counsel appeared at the audit of the first account of the executors and notified the auditor that they intended to make an application to set aside the conveyance made more than two years before. Early in 1869, both of the learned counsel who appeared for appellant before the auditor were informed by Mrs. Lippincott's attorneys that she would re-convey the interest she had purchased from appellant upon re-payment of the purchase money with interest. No notice was taken of this offer, and in April, 1869, it was renewed in writing, with a limitation as to the time within which it might be accepted. It was not accepted, nor was there any application made for a modification of the offer, or an extension of the time within which it might be accepted.

In April, 1871, appellant's petition, in which his grievances

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are fully set forth, was presented to the Orphans' Court, praying that the conveyance of his interest in the residuary estate to Mrs. Lippincott be set aside, and that he be permitted to participate in the distribution of said estate as though said deed had never been made. Thereupon Mrs. Lippincott and her husband, and the surviving executors of the will, appeared and answered the petition, denying all the allegations of fraudulent valuation, misrepresentation, etc., upon which the court was asked to set aside the conveyance. The issues of fact raised by the petition and answers were referred to an auditor, whose very able and exhaustive report, and the action of the court thereon, are now before us.

On the main questions of fraudulent valuation and misrepresentation charged in the petition, the learned auditor's conclusions, as stated by himself, are as follows :

"The representation of the value of the estate, and the interest therein proposed to be sold, the auditor finds was incorrect in the premises upon which the estimate of value was founded, and in the methods through which the resultant estimate was reached. . . . The auditor, however, after a most thorough and careful and repeated examination and consideration of the actual and absolute or naked facts of the case, which covered a very wide range, cannot find that there was in this incorrect representation and valuation, fraud upon the part of the executors who had thus placed themselves in such a relation of confidence to the seller. The auditor finds as a fact that this representation of the condition of the estate, and of the value thereof, and of the seller's interest therein, was incorrect, but that it was not fraudulent. It was a mistake, and such a mistake as would not unnaturally arise from the peculiar character of the assets of the estate and its complicated nature, and the complex relations of the parties concerned. The auditor is of opinion, and so finds, that, however mistaken the executors were, yet they honestly believed that the representations they made to the seller, the petitioner, were correct and fair for the purposes in view."

These conclusions of fact, we think are quite as favorable to the appellant as the evidence warranted. The facts and circumstances from which they are drawn by the auditor are so fully and clearly set forth in his report, and in the opinion of

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the court, that we have deemed it unnecessary to do more than outline them sufficiently to indicate the relation of the parties to each other and the principles involved in the contention.

While the record is somewhat voluminous, and the specifications of error very numerous, the controlling questions are very few. An examination of the record, and full consideration of the exhaustive arguments of counsel, have led us to the conclusion that the cardinal question in the case is, as tersely stated by the learned counsel for appellees: "Can a residuary legatee, being the wife of an executor of an estate, purchase the share of another residuary legatee, through the medium of her husband, in the absence of fraud; or, does the rule which forbids a trustee from buying at his own sale, apply to such a case, and render the sale voidable at the will of the vendor?"

There is no doubt as to the facts of which the first branch of this question is predicated. The relation of the parties to each other is strictly correct. As the learned auditor has correctly found, no fraud was practiced or even meditated; nor was there any mistake, on the part of the executors, or either of them, that can, under the circumstances, be regarded as tantamount to fraud. Assuming, for the sake of argument, that there was a mistake in their mode of estimating the value of the residuary estate, it was, as the learned auditor says, "such a mistake as would not unnaturally arise from the peculiar assets of the estate," etc.; and, "however mistaken the executors were, they honestly believed that the representations they made were correct and fair." The facts being so, there is neither reason nor authority for the position that, under such circumstances, and in the absence of fraud, actual or constructive, one legatee may not purchase the interest of another legatee. It is a mistake to contend that the rule which forbids a trustee from buying at his own sale, applies to such a case, and in any manner renders the sale either void or voidable, at the will of the vendor. Without questioning the soundness of the authorities relied on by appellant, it is sufficient to say, that they are inapplicable to the controlling facts of this case.

In connection with his review of the facts and circumstances leading up to the sale, the learned judge of the Orphans' Court, after fully considering the relation of the parties to the transaction, and other questions involved, came to the conclusion

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"that the parties to the sale stood at arm's length, and were, in law, equally matched;" that there was nothing in their relation to each other, or in the action of the executors, that ought to have the effect of rendering the sale either void or voidable; that it was not void, because it was not tainted with fraud, nor was it voidable at the election of appellant on the ground of unintentional mistakes "in the premises upon which the estimate of value was founded, because appellant agreed to sell and Mrs. Lippincott agreed to buy at the price ascertained by the statement and estimate furnished and submitted by the executors, and that, in the absence of fraud, or such mistake as is tantamount thereto, both parties were bound by their agreement to accept, as correct, the statement and estimate which was honestly prepared and submitted by the parties whom they voluntarily selected for that purpose, especially after approval of the estimate and execution of the contract of sale based thereon."

These conclusions were warranted by the facts found by the auditor and the authorities cited by the learned judge in his able and exhaustive opinion. It is unnecessary to make further reference to the facts of the case, or to review the authorities cited and relied on as applicable thereto. Enough has been said to show that the opinion of the Orphans' Court is an ample vindication of the correctness of its decree. The sale in question was clearly not void, because the fact that it was not tainted with fraud has been conclusively established. Assuming, for the sake of argument, that it was voidable at the election of appellant because of unintentional errors in the estimate by which the value of his interest in the residuary estate was ascertained, it was his duty to act with reasonable promptness. That was not done. His delay was inexcusable, especially in view of the offer of Mrs. Lippincott to re-convey on payment of the amount he received from her with interest. For reasons given in the opinion above referred to, we think the court below was also right in holding that appellant was estopped by his laches from assailing the validity of his conveyance.

Decree affirmed, and appeal dismissed at the costs of appellant.

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ESTATE OF CHARLES B. MILLER, DECEASED.

APPEAL BY W. W. WEIGLEY, EXR., FROM THE ORPHANS' COURT
OF PHILADELPHIA COUNTY.

Argued March 28, 1890—Decided October 6, 1890.

[To be reported.]

1. A judgment at law must sustain itself as a whole, and the reasons stated in the opinion of the judge are technically no part of the case; but in equity, especially when a claim has been dismissed without prejudice, the opinion of the chancellor is an integral part of the proceedings, and must be looked at to gather the exact tenor and extent of the decision.
2. The Orphans' Court has no jurisdiction to determine the existence of a partnership between a decedent and another, to take cognizance of partnership transactions, and to state an account between the surviving partner and the personal representatives of the deceased: Wiley's App., 84 Pa. 270; Ainey's App., 11 W. N. 568 (2 Penny. 192), followed; Brown's App., 89 Pa. 139, distinguished.

Before PAXSON, C. J., GREEN, CLARK, MCCOLLUM and MITCHELL, JJ.

No. 112 January Term 1890, Sup. Ct.; court below, No. 518 October Term 1885, O. C.

On January 11, 1886, the account of Grace M. Coffman, surviving executrix of the will of Charles B. Miller, deceased, was called for audit when George A. Miller presented a claim for \$16,000.61, alleged to be due to the claimant as the surviving partner of the decedent, on a statement of partnership accounts between them. Because of the pendency of a bill in equity relating to the alleged partnership,* the auditing judge postponed

* It appeared in the "History of the Case" that to March Term 1885, George A. Miller had filed a bill in equity against Grace M. Coffman, executrix of the will of Charles B. Miller, deceased, for a settlement of a partnership business with the decedent; that this bill was dismissed on demurrer as fatally defective: *Miller v. Coffman*, 16 W. N. 423; that the account of the executrix was filed with the Orphans' Court on December 28, 1885, and on January 8, 1886, George A. Miller filed a second bill in equity against the executrix, in the Common Pleas; that on June 19, 1886, on demurrer to this bill for want of jurisdiction, the demurrer was sustained

136	349
144	496

136	349
204	592

186	849
211	96

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further hearings until May 12, 1887. On that day, and other days afterward, hearings were had at which the claimant presented a partnership account, stated by himself, and showing a balance in his favor of the amount claimed by him, and adduced a large amount of testimony for the purpose of establishing the existence of the partnership and the correctness of his account. The testatrix presented evidence to rebut the testimony of the claimant.

On November 18, 1887, the auditing judge, ASHMAN, J., filed an adjudication dismissing the claim and finding in substance, as follows: (a) That the claimant asserted that more than half of the assets with which the accountant had charged herself belonged to him and not to the decedent, and so placed himself within the ruling in McBride's App., 72 Pa. 480; (b) that, assuming the claim to be made in the capacity of a creditor, the claimant would be such by force of his alleged status as a surviving partner; and, except in the single instance in which the executor or administrator occupies that place, the Orphans' Court cannot enter upon an examination of partnership accounts, being incapable, in other cases, of enforcing payment if the balance should be found against the surviving partner: citing Brown's App., 89 Pa. 139; Bentley's Est., 16 Phila. 263; Ainey's App., 2 Penny. 192; (c) that neither the existence of the partnership nor the alleged partnership accounts were sufficiently proved.

Exceptions to the dismissal of his claim, and to various findings contained in the adjudication, were filed by the claimant. While these exceptions were pending before the court, the claimant died, and William W. Weigley, his executor, was substituted upon the record.

On April 28, 1888, the court dismissed the exceptions of the claimant in an opinion of PENROSE, J., in part as follows:

The authority of the Orphans' Court does not extend to the enforcement of payment of debts due by a living debtor to the

by the Court of Common Pleas No. 1; and that on November 3, 1888, the plaintiff in the bill having died and his executor being substituted, a rule taken to amend the order of June 19, 1886, dismissing the bill by adding the words, "without prejudice," was discharged: *Weigley v. Coffman*, 23 W. N. 27.

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estate of a decedent; and hence, if for no other reason, it is clear that it can have no jurisdiction where a claim by a surviving partner involves the settlement of a partnership account. In a proceeding for this purpose, all parties are actors; and, though the bill may aver and the account as exhibited by the plaintiff show that the defendant is debtor, the decree enforceable by execution may be against the plaintiff for a balance in favor of the defendant. The decisions upon this point, many of which are cited by the auditing judge, are uniform: Wiley's App., 84 Pa. 270; Ainey's App., 11 W. N. 568; Bentley's Est., 16 Phila. 268; Hulse's Est., 12 Phila. 130.

Of course, where a surviving partner becomes himself the executor or administrator of the dead one, as in Brown's App., 89 Pa. 139, the settlement of his account in that capacity may involve an inquiry into the accounts of the firm; but this grows out of his office as executor or administrator, and results as an incident of the power of the court to make distribution, and the consequent right to consider all questions which may arise in ascertaining the balance for that purpose.

[It would, therefore, be time spent to no purpose, if we should consider the exceptions to the finding of the auditing judge against the claim of the alleged surviving partner, since even if we should be convinced, which we are not by any means to be understood as asserting, that a partnership existed, we should be unable to go a single step further, and our action would not avail elsewhere.] * [We dismiss, therefore, the exceptions on this subject simply for want of jurisdiction, and, necessarily, without prejudice to the right of the exceptant in the common law courts.] *

—The decree entered on the record was, so far as it concerned the claimant: "Exceptions of Geo. A. Miller dismissed without prejudice, per opinion by PENROSE, J." Thereupon William W. Weigley, executor, took this appeal, specifying that the court erred:

2, 3. In deciding that it had no jurisdiction as set forth in the parts of the opinion embraced in [] * 3

Various other assignments of error, relative to the dismissal of exceptions to the auditing judge's findings upon the merits of the claim, were filed.

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Mr. John H. Colton and Mr. Samuel C. Perkins for the appellant:

The balance due from one partner to another upon final settlement, is not a partnership, but a separate debt: *Hulse's Est.*, 12 Phila. 130; *Portsmouth v. Donaldson*, 32 Pa. 202; *Whelen v. Watmough*, 15 S. & R. 153; *Lindley on Partnership*, 740. The surviving partner, in a partnership composed of two persons, is the proper person to settle the business and state a final account. If this results in a balance against the deceased partner, the only way in which it can be recovered is by action at law, or by presentation to the Orphans' Court. The fact that the correctness of the claim may be disputed, either as to character or amount, does not oust the jurisdiction of the Orphans' Court: *Brown's App.*, 89 Pa. 139; *Price's Est.*, 81 Pa. 263; *Miller v. Coffman*, 16 W. N. 423.

Mr. Amos Briggs (with him *Mr. Abraham M. Beitler*), for the appellee.

OPINION, MR. JUSTICE MITCHELL:

Notwithstanding the complicated history of the case, and the varied phases of the litigation by the appellant in pursuit of a remedy, this record presents but a single question, and that is one of jurisdiction. The auditing judge, though apparently against his own opinion on the law, reviewed the evidence, and held that there was no partnership established. But the court in banc refused to consider the merits at all, and decided the case solely on the question of jurisdiction. It is the decree of the court only that we have before us, and we must look at it, and at the opinion of the judge, if necessary, to ascertain just what the court considered and determined. At law, the judgment must sustain itself as a whole, and the reasons adduced in the opinion of the judge are technically no part of the case. But in equity, especially where a claim is dismissed "without prejudice," the opinion of the chancellor is an integral part of the proceedings, which must be looked at to gather the exact tenor and extent of the decision. The decree here is that appellant's exceptions "are dismissed without prejudice, per opinion by PENROSE, J.," and, turning to that opinion, we find it expressed in the clearest possible terms that

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the exceptions of appellant to the findings on the facts by the auditing judge are dismissed "simply for want of jurisdiction." The elaborate arguments of both parties in this court, on the evidence taken before the auditing judge, are therefore irrelevant, and must be disregarded.

The executrix of Charles B. Miller having filed her account, the appellant came into the court below claiming a balance due him as surviving partner of the decedent. The fact of partnership was denied. It was the basis of the appellant's claim, and, until it was established, no step could be taken towards an accounting. But, even assuming it to be established, the accounting must be mutual, and the balance might be against the claimant. Has the Orphans' Court jurisdiction of such an issue? To state the question, thus cleared of irrelevant matters, seems to answer it in the negative. It is not claimed that an account was stated by the assumed partners, in the lifetime of both, and a balance found due to appellant upon which he would have a standing as a creditor, to maintain assumpsit, or to come in as a claimant upon the fund. His standing as a creditor at all, in which character alone can he make his claim, depends on the establishment of the disputed facts of the existence of a partnership, and a balance due him as a creditor partner upon the accounting. These facts the Orphans' Court has no jurisdiction to determine, nor would it have any means of enforcing payment by appellant should the account, when stated, show a balance against him. Such issues belong to the Common Pleas, either in an action of account, or in the more convenient form of a bill in equity, where the chancellor has control over both parties to enforce performance whichever way the final result may turn out. Even in a case where the settlement of partnership accounts seemed to be involved in the specific execution of the contract of a decedent to convey land, it was said by our Brother STERRETT, that "it was never intended by the framers of the act of 1834 to oust the jurisdiction of equity in the settlement of partnership transactions, in which questions of title and specific performance of agreements in relation to real estate are very frequently involved. In such cases the court of equity is the proper forum. . . . The Orphans' Court has no power, expressly or by implication, to take cognizance of partnership

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dealings, and state an account between the surviving partner and the personal representatives of the deceased:” Wiley’s App., 84 Pa. 270, 272, 273. This case, and Ainey’s App., 11 W. N. 568, really decide the present question. There is nothing in Brown’s App., 89 Pa. 139, that qualifies in any way the authority of these decisions upon this point.

The appellant is of course entitled to a hearing on the merits of his case, but his forum is the Common Pleas. If his previous efforts there have, as seems from the history of the case, been defeated solely upon the question of jurisdiction, they will not stand in his way now to a hearing upon a proper bill.

Decree affirmed.

ESTATE OF JOHN LAWRENCE, DECEASED.

APPEAL BY S. APPLETON ET AL. FROM THE ORPHANS’ COURT
OF PHILADELPHIA COUNTY.

Argued March 28, 1890—Decided October 6, 1890.

[To be reported.]

1. When the donee of a power to appoint, by will, real estate situated in Pennsylvania, dies domiciled in another state, leaving a will containing an appointment of such realty, and which is probated in the forum of the domicile, the validity of the appointment so made, as an execution of the power, is to be determined by the law of Pennsylvania.
2. The rule against perpetuities, to wit, that no interest, subject to a condition precedent, is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest, is unmodified by statute, except as § 9, act of April 18, 1853, P. L. 507, and § 12, act of April 26, 1855, P. L. 332, operate in restraint of accumulations.
3. When a power of appointment is given, either by deed or will, the rule applies as well to the power as to the appointment; and, if made exercisable at a time beyond the limits of the rule, the power is bad: but, when it must be exercised, if at all, within the legal limit, it will not be rendered void by the fact that, within its terms, an appointment might possibly be made which would be too remote.
4. Except when the donee of the power has absolute control, so that he can appoint to himself, or to any other person to take in his lifetime, and therefore is practically the owner, the remoteness of the estate ap

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- pointed must be measured from the time of the creation of the power, and no estate can be limited thereunder which would have been too remote if limited in the instrument creating the power.
5. When the donee of a power to devise, who was in being at the creation of the power, appoints by will, in trust for life-tenants to take at his death, with remainder over, such appointment for life will be good, whether the appointees for life were born before or after the creation of the power, and even if the estate appointed in remainder be too remote: *Smith's App.*, 88 Pa. 492, overruled in part.
 6. If the estate in remainder, appointed by such donee, is vested at his death, its enjoyment merely being postponed until the determination of a preceding vested estate for life, the rule against remoteness, which has regard to the time when the estate vests so as to be disposable by the grantee or devisee, is satisfied: *Smith's App.*, 88 Pa. 492, doubted but distinguished.
 7. Under a general power of appointment, authorizing the donee to "grant and convey the real estate in fee in such parts or shares" as he may by his will direct, but giving no express authority to declare trusts, the donee may appoint the fee to trustees for the benefit of certain persons for life, with remainder over in fee, observing in such appointment the rule against remoteness.

Before PAXSON, C. J., GREEN, CLARK, MCCOLLUM and MITCHELL, JJ.

No. 118 January Term, 1890, Sup. Ct.; court below, No. 53 April Term 1889, O. C.

On April 20, 1889, on petition of Ann E. A. Griffin, the court below awarded a citation to Elizabeth H. Appleton and others, requiring the respondents to show cause why the Union Trust Company should not be appointed trustee under the will of John Lawrence, deceased, in accordance with an appointment prescribed by the will of Ann Appleton, deceased, in pursuance of provisions contained in the will first mentioned. On May 6, 1889, a supplemental petition was filed, whereupon the court directed that a citation issue to the original respondents, and also to Henry Pomerene, to show cause why, upon the appointment of a trustee as prayed for in the original petition, and the entry of his bond, said Henry Pomerene should not transfer to such trustee all papers and property in his hands belonging to the trust estate.

The following facts appeared from the petitions and the answers of the respondents thereto:

John Lawrence died in 1847, domiciled in Philadelphia, leav-

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ing a will, duly admitted to probate, by which he bequeathed and devised his estate, real and personal, to trustees, upon trusts which were declared therein as follows:

"1st. In trust to keep the real estate in repair and rented, and the personal estate securely invested, and to change the mode of investment whenever it may be discreet to do so.

"2d. In trust to pay the net income of the said real and personal estate to my well beloved and most dutiful daughter, Ann Appleton, wife of James Appleton, of New York, in half-yearly payments, in each and every year as long as she shall live, upon her own receipts and free from the control of her husband, and from all liability for his debts or responsibilities.

"3d. In trust upon the decease of my said daughter Ann, to grant and convey the said real estate in fee, and to assign, transfer and deliver the said personal estate, to such person or persons and in such parts or shares, as she, my said daughter Ann, shall by her last will (made during the lifetime of her husband or otherwise) direct to have and to be the receiver or receivers of the said real and personal estate or shares thereof.

"4th. In trust in case my said daughter Ann shall die intestate, to grant and convey the said real estate in fee, and to assign, transfer and deliver the said personal estate to my grandchildren her surviving and the issue of any of my grandchildren, who may have died before her, equally among them share and share alike, but the issue of any grandchild who may have died before my daughter Ann, shall have (equally among them if more than one) only the share which the parent would have had if he or she had survived my said daughter."

In August, 1860, the trustees named in said will were removed for cause by the Orphans' Court, and Henry Pomerene and George W. Appleton were appointed trustees in their place and stead. By a devastavit of the original trustees, all the trust property except certain real estate in Philadelphia had been lost.

In the year 1883, the testator's daughter, Ann Appleton, died in Camden county, New Jersey, wherein she was then domiciled, leaving a will dated March 19, 1881, which was duly admitted to probate before the surrogate of Camden county, and letters testamentary thereon granted to George W. Appleton whom the testatrix therein named as her executor. Hei

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will recited the devise and bequest made by the will of John Lawrence, as aforesaid, and the devostavit of the trustees, etc.; and, after directing the payment of all just demands against her estate, devised and bequeathed all the residue thereof, and all the remaining property so devised by the will of John Lawrence to the testatrix, describing it, unto her executor, George W. Appleton, in trust: (1) to keep the real estate in repair and rented, and all interest and taxes due thereon paid; (2) to sell certain real estate in New Jersey, and, in case of destruction of buildings on any other real estate, to sell the lots, and to invest the proceeds; (3) to pay from the net income certain legacies and annuities to children and grandchildren of the testatrix and others, all of said children being mentioned by name, with provisions that none of said annuities should continue longer than until the death of the last child of the testatrix who should survive her; and (4)

“Upon the decease of my last children surviving, to grant, convey and make over all real and personal estate, then remaining, to the New York Baptist Union for Ministerial Education, located at Rochester, New York, to be applied by the trustees of the said Union according to their discretion, to the support of German students studying for the Baptist ministry in the German department of the Rochester Theological Seminary under the control of said Union, each student to receive one hundred (100) dollars a year, and upon graduation twenty-five (25) dollars to be expended in books suitable for his use in such ministry, until the proceeds of such estate shall have been fully expended in such manner.”

The will also provided as follows: “Upon the decease of my said executor or upon his properly certified desire to be relieved of said trust, I do hereby appoint the Philadelphia Trust Safe Deposit and Insurance Company of the city of Philadelphia, state of Pennsylvania, my executor and trustee for the like purposes.”

The children of the testatrix who survived her were all living at the date of the death of John Lawrence. George W. Appleton, the executor and trustee, died December 1, 1886. The Philadelphia etc. Co., named by the testatrix as his successor, renounced the trust, and after December 1, 1886, the office of trustee, under the appointment made by Ann Appleton, had remained vacant.

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After the death of George W. Appleton, Henry Pomerene, as surviving trustee under the will of John Lawrence, settled an account, embracing the entire trust estate under said will, and the income thereof, which account was referred to Mr. Arthur Moore, as auditor, the filing of whose report as such was delayed, in consequence of an application made to him by the petitioner's attorney, for a hearing.

The petitioner and the original respondents were named as beneficiaries in the will of Ann Appleton, or were representatives of persons so named. Henry Pomerene as trustee, and some of the other respondents, who claimed to take, not under the will of Ann Appleton, but directly under the fourth clause of the will of John Lawrence, objected by their answer to the granting of the prayers of the petition and asked that it be dismissed; denied the jurisdiction of the court; averred that the will of Ann Appleton was not a sufficient, proper and legal exercise of the power of appointment conferred upon her by the will of John Lawrence, and had no effect upon the limitation of the trust property thereunder; objected that certain persons interested under the alternative limitation, provided for by the will of John Lawrence, in default of an appointment by Ann Appleton, were not made parties to the proceeding; and denied that any cause was shown for the substitution of any trustee in the place of Henry Pomerene.

After hearing upon the petitions and answers, the court without opinion filed, made the following decree:

"And now, this — day of June, 1889, this cause having been heard sur petitions filed and answers thereto made, this court appoint the Union Trust Company trustee under the power of appointment exercised in the will of Ann Appleton, deceased, pursuant to the will of John Lawrence, deceased, the donor of said power, and under the further general trust directed by the will of the said Ann Appleton, of all her property; and it is further ordered and directed that Henry Pomerene, who survives George W. Appleton, co-trustee with him, the said Pomerene, under the will of the said John Lawrence, forthwith grant and convey to the said company all real estate, and assign, transfer and deliver to it all personal property as to which said power of appointment was prescribed, and all property whatsoever, real or personal, which may be held by

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him, the said Pomerene, trustee as aforesaid, saving and excepting such moneys as are included in the accounts heretofore presented to the auditor appointed by this court to audit, settle and adjust the account filed by the said Pomerene, surviving trustee as aforesaid, and that the said Henry Pomerene and any other person in possession of any leases or other documents or things whatsoever, necessary or useful for the future management of any part of said property hereinbefore designated, shall likewise forthwith deliver the same to said company for use in its capacity as trustee by virtue of the above appointment."

Thereupon Henry Pomerene, surviving trustee etc., and Samuel Appleton, and others of the respondents, took this appeal, specifying that the court erred :

1. In appointing the Union Trust Company trustee.
2. In decreeing that the appointment by Ann Appleton was a valid exercise of the power conferred upon her.
3. In decreeing a conveyance of the trust property by Henry Pomerene, trustee, to the Union Trust Company.

Mr. John G. Johnson (with him *Mr. William A. Manderson*), for the appellants :

This case is directly ruled by Smith's App., 88 Pa. 494, in which an appointment by will, identically similar to that made by Mrs. Appleton, was held void as being within the rule prohibiting perpetuities. The appointment in the present case is bad for another reason : No power to declare uses and trusts was conferred upon Mrs. Appleton. Her authority under her father's will was to grant the real estate in fee, and her duty was to name the persons who should receive it for their own benefit. Instead of doing this, she undertook to convey it to her executor with directions to pay out of it certain annuities, etc., etc.

Mr. E. Spencer Miller, for Ann E. A. Griffin and the Union Trust Company, appellees :

1. The appointment made by Mrs. Appleton is not bad because it declares trusts. A power to appoint the fee authorizes the appointment of any smaller interest, or of any legal

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limitations within the scope of the power, which may be carved out of the fee: *Bovey v. Smith*, 1 Vern. 84; *Crozier v. Crozier*, 3 Dru. & War. 353; *Farwell on Powers*, 255; *Sugden on Powers*, 411. In no cases, even those where the exercise of the power was limited to a class, has the mere absence of express permission to declare trusts been held to exclude the authority: *Boyles's Est.*, 5 W. N. 363; *Fidelity etc. Co.'s App.*, 4 W. N. 265; *Willis v. Kymer*, L. R. 7 Ch. D. 181; *Alexander v. Alexander*, 2 Ves. Sr. 642. In the present instance, the power was unrestricted, and no actual interest could vest in any one save by virtue of the donee's action. In such case especially, no restriction as to the character of the estates to be appointed should be inferred.

2. The appointment would not break the rule against perpetuities. All the children of Mrs. Appleton were alive at the death of John Lawrence. The considerations bearing upon the point whether Smith's App., 88 Pa. 494, was rightly decided, are well known to this court: See *Gray on Perp.*, §§ 523 et seq. We submit, only, that it is carrying to a great extent the test of inserting the donee's language in the donor's will, to hold that the meaning plainly attached to those words by the donee, whose words they were, is to be disregarded, and they are to be given a meaning they would have had years before, in the mouth of the donor, whose words they were not. But even if Smith's Appeal be sustained, this appointment is good. It does not violate the rule against perpetuities as declared in *Hillyard v. Miller*, 10 Pa. 334, approved in Smith's App., 88 Pa. 495, and *Mifflin's App.*, 121 Pa. 205, since the estate given to the theological seminary, most of the legacies and annuities to others, and the legal title of the trustee, all vested at Mrs. Appleton's death: *Gray on Perp.*, §§ 289, 389, et seq.

Mr. J. Howard Gendell, for the New York Baptist Union, etc., appellee:

1. If necessary, we would ask a reconsideration of Smith's App., 88 Pa. 492, and we may do so with propriety since it has been doubted in *Coggins' App.*, 124 Pa. 10. It should be overruled, because it overlooks the distinction between the mode in which the execution of a power takes effect, and the interpreta-

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tion of the language used in executing it. It is not Mrs. Appleton's language, but the true interpretation thereof, that is to be written into John Lawrence's will: See Gray on Perp., § 523 et seq. So, too, this decision overlooks the distinction suggested in Sugden on Powers, *471-474, between particular powers, in which the right to appoint is restricted to certain objects, and general powers, authorizing the donee to appoint to any one, the latter not being within the mischief against which the rule against perpetuities is intended to guard.

2. Smith's Appeal, however, does not apply: (a) Because by her children, Mrs. Appleton evidently meant the specific persons whom she had previously named as such, and therefore the case is within the exception stated in the opinion in Smith's Appeal; (b) because the interests appointed to her children, and the remainder appointed to the Baptist Union, all vested at her death, and estates which vest and so become alienable, within or at the end of a life or lives in being at the creation of the power and twenty-one years after the termination of such lives, are not within the rule: Coggins' App., 124 Pa. 10; Ashhurst's Est., 17 W. N. 538; Gray on Perp., §§ 205, 322; Lewis on Perp., §§ 5-11; 1 Jarman on Wills, 252, 253; Kivern v. Williams, 5 Sim. 171. No contingency whatever is annexed to the gift over; it is absolutely vested, and only its possession and enjoyment are postponed.

3. The appointment is not bad by reason of the gifts to trustees and the carving out of life-estates; for a fee-simple includes all estates, legal and equitable, that can be carved out of it: 2 Bl. Com., *164, *165; Lancaster v. Dolan, 1 R. 231; Zane v. Kennedy, 73 Pa. 182; Watts's App., 78 Pa. 370; 1 Sugden on Powers, *496; Farwell on Powers, 255; Chance on Powers, 1217; Keefer v. Schwartz, 47 Pa. 503. Appointments in trust may be made even under a special power: Horwitz v. Norris, 49 Pa. 213; Boyles's Est., 5 W. N. 363; Pepper's App., 120 Pa. 235; Crompe v. Barrow, 4 Ves. Jr. 681; Alexander v. Alexander, 2 Ves. Sr. 642; Trollope v. Linton, 1 Sim. & Stu. 477; Willis v. Kymer, L. R. 7 Ch. D. 181; Friend v. Oliver, 27 Ala. 532; 2 Sugden on Powers, *273. A fortiori, is this true of a general power like the present, in which the donor regards the donee only. But the positions of the appellants, if sustained, would simply rule them out of court. The

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estate has been appointed in fee to the Baptist Union, and even if the preceding particular limitations should fall, that appointment in fee must stand. The execution of a power may be good in part, although bad as to part: *Horwitz v. Norris*, 49 Pa. 213; *Boyles's Est.*, 5 W. N. 363.

OPINION, MR. JUSTICE CLARK :

John Lawrence died domiciled in the city of Philadelphia, in the month of March, 1847. By his last will and testament he devised all his real and personal estate to certain persons therein named, in trust, to pay over the net income, during her lifetime, to his daughter, Ann Appleton; to assign the real estate, upon her decease, in fee to the appointees of her last will; or, failing such appointment, to pay over the same to and amongst her then living children, and the issue of children then deceased.

The trustees named in the will were removed by the Orphans' Court of Philadelphia county, during the lifetime of Ann Appleton, and George W. Appleton and Henry Pomerene were duly appointed trustees in their place. All the property, except certain real estate in Philadelphia, was lost by the devastation of the original trustees, the remaining property being known as No. 43 South Second street, No. 221 Arch street, and Nos. 1127 and 1129 Pine street.

Ann Appleton, the donee of the power, died in March, 1883, domiciled in the state of New Jersey, leaving to survive her certain children, all of whom, it is conceded, were born during the lifetime of John Lawrence. By her last will and testament in writing, which was afterwards duly probated, she devised to George W. Appleton, and, in the event of his renunciation or decease, to the Philadelphia Trust etc. Company, certain property of her own, in Haddonfield, N. J., and also all that remained of the property over which she held the power of appointment under the will of John Lawrence, deceased, specifically referring thereto, in trust, to care for the same and collect the income thereof during the joint lives of her children, all of whom, as we have said, were living at the death of John Lawrence; to pay out of such income and the proceeds of sale of the Haddonfield property, if sold under the authority given, certain annuities mentioned, during that period, and, after the

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expiration of said joint lives, to transfer the corpus of the property to the New York Baptist Union for Ministerial Education, which is the corporate name of what is known as the Rochester Theological Seminary.

George W. Appleton died December 1, 1886, and, the Philadelphia Trust etc. Company having renounced the trust, the office of trustee under the appointment in the will of Ann Appleton became vacant; whereupon Ann Eliza Griffin, one of the annuitants for life, presented her petition for the appointment of a successor to the trust created by the donee of the power. The appellants resisted this application, alleging that the execution of the power by Ann Appleton was invalid, and that Mrs. Griffin had therefore no standing in court to ask for the appointment of a trustee, the estate having passed to those entitled in remainder under the will of John Lawrence, deceased, as if Ann Appleton had died intestate. Their contention is, first, that the appointment violates the rule against perpetuities, and is therefore wholly void; and, second, that whilst the donee of the power, by its terms, could make a direct, immediate, and absolute appointment of the fee, she was not authorized to declare uses and trusts as contained in her will.

The rule, as stated in Gray on Perpetuities, is as follows: "No interest, subject to a condition precedent, is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." This rule is in force in all of the states where the principles of the common law prevail, excepting as it may have been modified by statute. In Pennsylvania it is unaffected by statute, only as it is modified by the acts of April 18, 1853, § 9, and April 26, 1855, § 12, which were suggested by the Thelluson Act, and operate only in restraint of accumulations. It seems to be conceded, and rightly too, we think, that, although Ann Appleton was domiciled at her death in New Jersey, the validity of the appointment, if there should be any conflict, is to be determined by the laws of Pennsylvania, which is the *lex rei sitæ*: any inquiry as to the law of New Jersey is therefore rendered unnecessary. The rule as stated, applies to interests in realty or in personalty, whether legal or equitable, but has no application to an interest which is vested, for a vested interest by its very nature cannot be subject to a condition precedent.

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So, also, where a power of appointment is given, either by deed or will, the rule applies as well to the power as to the appointment. If a power can be exercised at a time beyond the limits of the rule it is bad. As, in the case at bar, however, the power must be exercised, if at all, in the lifetime of Ann Appleton, a life in being at the time of its creation, it cannot be impeached upon that ground; and, although the power, to be exercised by will only, is in the most general terms, it is not rendered bad by the fact that, within its terms, an appointment might possibly have been made which would be too remote: Gray on Perp., § 510. The direct and specific object of the power, according to its terms, is not to create a perpetuity; and, as the exercise of it is necessarily according to a certain discretion or latitude of choice in the donee, the security, which the law provides against the violation of the law of remoteness, is in the failure of any disposition which results from the abuse of that discretion: Lewis on Perp., 487. The question, therefore, is upon the validity of the appointment which was in fact made.

As a general rule, whether an appointment made in execution of a power is too remote, depends upon its distance from the creation of the power, and not from its execution: Gray on Perp., § 514; Lewis on Perp., 484. The exception is, when the power is general to the donee to appoint to whomsoever he may choose, either by deed or will; in such case, the donee has absolute control as if he had the fee, since he can appoint as well to himself as to any other person; he is practically the owner. In such case, the degree of remoteness is measured from the time of the exercise of the power, and not from the time of its creation: Bray v. Bree, 2 Cl. & F. 453; Sugden on Powers, 394, 683; Lewis on Perp., 483; Gray on Perp., §§ 477-524; Mifflin's App., 121 Pa. 205. But it will be seen that the power given to Ann Appleton is a power to be exercised by will only: her authority is not commensurate with the entire ownership; she could not appoint to herself, nor to any other person to take in her lifetime. She had not the absolute control; and, although the decisions are somewhat conflicting, and the question not free from doubt, the better opinion seems to be that the power must be regarded as special, and therefore the remoteness of the estate created by the appointment must be measured from the time of the creation of the power, which was at the death of John Lawrence:

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See *In re Powell's Trusts*, 37 Law J. Ch. 188; *Gray on Perp.*, § 526; and cases there cited. No estate or interest can be limited under a particular power, which would have been too remote if limited in the deed or will creating the power: *Lewis on Perp.*, 488.

But, assuming that the remoteness of the appointment depends upon its distance from the creation of the power, it is plain that the several bequests and annuities made in the last will and testament of Ann Appleton, deceased, were to persons named, and in being, for distinct and separable sums of money by way of bequest or annuity out of the proceeds of her own and the income of the original trust estate.

The manifest purpose of the trust was to preserve the estate for the legatees and annuitants, for the life of her children and the survivor of them. At the death of the last child her surviving, this object would be fully attained; the annuities, whether to children, grandchildren, or to others, were then to terminate, and the entire trust-estate then remaining was to be conveyed to the New York Baptist Union, etc., in fee, to be applied as by the will is directed. We have, then, a devise to the trustees, in trust for the annuitants, for the life of the children of the donee and the survivor of them, with a remainder over in fee to the Baptist Union. Ann Appleton, as the donee of the power, had the right by her will to appoint to whom she chose: she certainly had a right to appoint to her children for life, or to trustees for their use for life, whether they were born before or after the decease of John Lawrence; and that, although the estate in remainder might be too remote, for the annuitants would take at her decease. "Where, under a power, interests are given by way of particular estate and remainder (including analogous gifts of personal estate), and the particular estate is limited to a valid object of the power, but the remainder is too remote, the appointment will not be wholly void, but only the gift in remainder. In such case, the interests, in respect of which there is an excess of the power, being distinct and separable from the valid portion of the appointment, there is no reason for involving the primary limitation in the remoteness of the remainder:" *Lewis on Perp.*, 496; citing *Adams v. Adams*, Cowp. 651; *Bristow v. Warde*, 2 Ves. Jr. 336; *Routledge v. Dorril*, 2 Ves. Jr. 357; *Brudenell v.*

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Elwes, 1 East 442 (7 Ves. 382); *Butcher v. Butcher*, 9 Ves. 382; *Gray on Perp.*, §§ 232, 239, 242, citing *Read v. Gooding*, 21 Beav. 478 (4 De Gex, M. & G. 510), and other cases. See, also, *Davenport v. Harris*, 3 Gr. 168. In this respect we think the ruling in *Smith's App.*, 88 Pa. 492, was wrong; for, although Ryan's daughter, Mrs. Smith, might have had children born after his decease, her children, whether born before or after Ryan's death, would have taken at her death, and the life-estates were therefore good, whereas it was held that her appointment was wholly bad. This statement of the law would seem to be decisive of the case at bar, for the proceeding is not by the party entitled in remainder, for a conveyance, but by one of the annuitants, for the appointment of a trustee for the purposes of the trust subsisting under the will of Ann Appleton, for the benefit of the annuitants, during the life of her children.

But the estate of the Baptist Union also vested at the death of Ann Appleton. The beneficiaries under her will are described by name; to each is given a separate and distinct sum by way of legacy, or annuity, to each one *eo nomine*, and, as we have said, their rights vested at their mother's death. The remainder was ready, at any time after the death of Ann Appleton, to come into the possession of the Baptist Union whenever and however the life-estate might determine: it was subject to no condition precedent, save the determination of the preceding estate: the contingency was not annexed to the gift, or to the person entitled, but to the time of enjoyment merely, and, according to all the cases, the remainder must be treated, not as a contingent, but as a vested estate. If this be so, the rule against remoteness is satisfied; for, not only the particular estate, but the remainder supported by it, took effect within lives in being at the creation of the power. "The particular feature," says Mr. Lewis, in his treatise on *Perpetuities*, "in limitations of future interests, with which the rule against perpetuities is connected, is the time of their vesting, or, in other words, of their becoming interests transmissible to the representative of the grantee, devisee, or legatee, and disposable by him. When they are so limited as necessarily to allow this quality, within the legal period of remoteness, they are free from objection in reference to the perpetuity rule." Upon

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this question we may also refer to Mifflin's App., 121 Pa. 205: "If a remainder is vested, that is, if it is ready to take effect whenever and however the particular estate determines, it is immaterial that the particular estate is determinable by a contingency which may fall beyond a life or lives in being:" Gray on Perp., § 209. Perpetuities are grants of property wherein the vesting of an estate is unlawfully postponed: Philadelphia v. Girard's Heirs, 45 Pa. 26; Barclay v. Lewis, 67 Pa. 316. The main question decided in Smith's Appeal is therefore not involved in this case. The accuracy of that decision has been somewhat doubted by the learned judge who wrote it: Coggins' App., 124 Pa. 10; but the subject can only be further considered when a proper case is presented.

Nor do we think the appointment is invalid, because in the exercise of the power the donee, without special direction of John Lawrence, the testator, to that effect, in appointing the fee declared certain uses and trusts for life, with remainder over. The power conferred upon Mrs. Appleton by her father's will was "to grant and convey the real estate in fee," "in such parts or shares" as she by her last will should direct. The power is wholly unrestricted: the entire discretion is committed to the donee of the power, to grant the fee in such form and to such persons as she chose. In the exercise of that power she did appoint the fee, and we think she was authorized, observing the rule against remoteness, to declare such uses and trusts for life as would best carry out her wishes with respect to the ultimate disposal of the property. No authorities have been cited to any different effect. On the contrary, appointments in trust, even under restricted powers, would seem to have been sustained, and, as illustrations of this, we have been referred to Alexander v. Alexander, 2 Ves. Sr. 642, Trollope v. Linton, 1 Sim. & S. 477; Crompe v. Barrow, 4 Ves. 681; Willis v. Kymer, 7 Ch. Div. 181; 2 Sugden on Powers, 273, 274.

The decree of the Orphans' Court is affirmed, and the appeal dismissed at the cost of the appellants.

Statement of Facts.

W. C. CROOKS v. W. M. BUNN.

APPEAL BY PLAINTIFF FROM THE COURT OF COMMON PLEAS
NO. 1 OF PHILADELPHIA COUNTY.

Argued March 31, 1890—Decided October 6, 1890.

Self-serving and consonant declarations of a party to an action, whether verbal or by letter, and though made ante litem motam, are inadmissible, unless when a part of the *res gestæ*, or offered to rebut evidence of a want of credibility or of a recent fabrication: *Packer v. Gonsalus*, 1 S. & R. 526; *Henderson v. Jones*, 10 S. & R. 322; *Craig v. Craig*, 5 R. 91; *McKee v. Jones*, 6 Pa. 425, distinguished.

Before STERRETT, GREEN, CLARK, WILLIAMS and MITCHELL, JJ.

No. 87 January Term 1890, Sup. Ct.; court below, No. 105 March Term 1886, C. P. No. 1.

On March 27, 1886, William C. Crooks brought case for libel against William M. Bunn. Issue.

At the trial on December 31, 1886, it was made to appear that the libelous matter complained of was the publication of certain defamatory articles in the Sunday Transcript, of which it was alleged that the defendant was editor and proprietor. The articles appeared in the issues of September 28, 1885, and March 31, 1886. The libelous character of the articles was not controverted, nor that they were of and concerning the plaintiff; but the defendant set up that in June, 1884, he had leased the Sunday Transcript to Thomas M. Jackson, the former managing editor, and that thereupon he had assumed the duties of governor of Idaho, to which office he had been appointed, and had no further connection with the paper until sometime in June, 1886.

Thomas D. Lindsey, called for the defendant, testified that he was the city editor of the Sunday Transcript, and that immediately prior to the time the defendant went west, in June, 1884, the witness was called to the office by Mr. Bunn, into the presence of Mr. Jackson: Q. What directions did you receive? Objected to.

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By the court: I am inclined to let it go to the jury for what it is worth; exception.³

A. I was officially informed by Mr. Bunn that the control of the Transcript had passed from his hands into that of Mr. Jackson, and Mr. Jackson said: "I am now your boss, the editor and proprietor of this establishment; of course, you look to me in the hereafter;" which I did from that time on.

Harper F. Smith, called for defendant, testified that he was the business manager of the Sunday Transcript, and referred to a conversation had in the office with the defendant and Mr. Jackson, in the latter part of May, 1884: Q. What was the conversation? Objected to.

By the court: Objection overruled; exception.³

The witness testified, also, to rentals paid by Mr. Jackson to the defendant: Q. What is the first entry of June 1, 1884? Objected to.

By the court: Objection overruled; exception.⁴

A. June 1, 1884, to one year's rental, \$7,500; by moneys paid on William M. Bunn's account, from June 1, 1884, to January 1, 1885, \$2,946.17.

The defendant offered in evidence a letter signed by himself, directed to Mr. Lindsey, one of the foregoing witnesses, and dated, "Territory of Idaho, Executive Department, December 26, 1884," as follows:

"MY DEAR LINDSEY: Your letter was received. I am very glad Jackson is happy and doing so well with the Transcript. As you say, he ought to make at least three or four thousand dollars during his two years lease, and if he does I am in hopes he will feel like and be able to form a company that will buy the plant of me. I do not want to go back to Sunday journalism unless I am compelled to. I shall resign during the summer."

Objected to.

By the court: This letter, it strikes me, does not rise any higher than the testimony given by Mr. Lindsey, who says he was present at the transfer. I will rule on it, if you desire.

Mr. Warwick: I would like to have that letter go in evidence, and we ask your Honor for a ruling.

By the court: Admitted; exception.¹

At the close of the testimony, BREGY, J., charged the jury,
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who returned a verdict in favor of the defendant. A rule for a new trial having been discharged, judgment was entered, when the plaintiff took this appeal, assigning for error :

1-4. The admission of defendant's offers.^{1 to 4}

Mr. George H. Earle, Jr. (with him *Mr. Richard P. White*), for the appellant.

Counsel cited : Duvall v. Darby, 38 Pa. 56 ; United States v. Mertz, 2 W. 407 ; Cummings v. Gann, 52 Pa. 488 ; McGregor v. Sibley, 69 Pa. 388 ; Wiley v. Christ, 4 W. 200 ; Wolle v. Brown, 4 Wh. 367 ; Clever v. Hilberry, 116 Pa. 488.

Mr. Charles F. Warwick (with him *Mr. James H. Shakespeare*), for the appellee.

Counsel cited : Packer v. Gonsalus, 1 S. & R. 526 ; Henderson v. Jones, 10 S. & R. 322 ; Craig v. Craig, 5 R. 91 ; McKee v. Jones, 6 Pa. 429.

OPINION, MR. JUSTICE GREEN :

The letter of December 26, 1884, was a private letter, written by the defendant to his friend, Mr. Lindsey. The latter had long been, and was at the time Mr. Bunn was appointed governor of Idaho, city editor of the Transcript, and continued as such thereafter. The letter was written in December, 1884. The defendant claims that he made a lease of the Transcript property to Jackson in June, 1884, and did not resume his connection with the paper till about June 1, 1886, or very shortly before. The contents of the letter prove that it was a mere friendly letter, in which the fact of Jackson's connection with the Transcript, and his success in managing it, are mentioned, with an expression of the writer's satisfaction, and of the hope that Jackson might be more able to buy the plant of him. The letter was in no sense any part of the transaction by which the transfer of the Transcript was made. It had nothing whatever to do with any of the actual facts of the case. It was of no more significance than would have been a conversation between Bunn and Lindsey, at the date of the letter, in which the same words were uttered verbally that were written in the letter. How can it be that such a declaration, made by the defendant to a personal friend, in the absence of

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the plaintiff, in a casual letter, being no part of and having no possible connection with the actual transaction of the transfer of the newspaper in question, be made legal evidence in favor of the declarant and against the plaintiff, to support an allegation that such a transfer had been made? If it was not evidence in support of such an allegation, it was not evidence at all, being totally irrelevant for any other purpose.

It was, then, simply Mr. Bunn's assertion to Mr. Lindsey that he had leased the Transcript to Mr. Jackson at some time anterior to the letter. As a matter of course, it was not original or primary evidence; nor, was it secondary evidence, which may be given when primary evidence is lost or cannot be had. But a single reason is, or can be, offered for its admissibility, and that is, that it is competent to show that the defendant, at another time and place, made a statement of the transaction consistent with his present testimony. But that is no reason of itself alone, else a party could constantly make testimony for himself, to be subsequently used in the trial of a cause. It is said, however, that such a declaration can be given to disprove a contrary allegation of recent fabrication. But what can we know respecting such an allegation? Where does it appear in this case? What is there on the record to show us that such a charge has been made against the defendant? Nothing. Where a person has testified in one way on the trial, and proof has been given that at another time he gave a different version of the same subject matter, that proof, of course, appearing on the record, it is sometimes, and in some circumstances, competent to show that at some other time he has made statements of the same matter consistent with his present testimony. Thus in *Packer v. Gonsalus*, 1 S. & R. 526, Chief Justice TILGHMAN thus states the rule: "Where the credit of a witness is impeached by evidence that he said something inconsistent with what he has sworn at another time, this may be rebutted by proof of other declarations by him in conformity with what he has sworn; because, both being without oath, one is as good as the other, and the jury will judge of his credit on the whole."

Justice DUNCAN, in *Henderson v. Jones*, 10 S. & R. 322, says: "There is only one point in this cause. Where a witness is contradicted, and evidence given to impeach his character,

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can evidence be given of what he swore on a former trial, to show his consistency and corroborate him?" The opinion proceeds to show that such evidence can be given. But these cases are of no service in the present contention, for the simple reason that there are no facts on the record to give them application. There is no proof that Mr. Bunn ever admitted to any one that, in point of fact, he was the owner, editor or publisher of the Transcript, at the time the libelous articles were published. There is certainly no proof that he ever so testified in any other case. What then is to be corroborated? Simply his own present testimony. But that will not do. He testified fully in regard to the whole subject of the ownership of the paper. He gave no inconsistent statements in regard to that matter, and no statements inconsistent with any other statements made by him at any other time, in or out of court, and hence it is that the peculiar circumstances which permit the introduction of this very exceptional kind of testimony are not present.

What is said in *Craig v. Craig*, 5 R. 91, is in no respect different from the ruling in the preceding cases. GIBSON, C. J., said in that case: "But statements by a witness at another time, though admissible to contradict him, are not equally so to confirm him. They are certainly not receivable before his credibility has been assailed; but it is a vexed question whether they may not be used to rebut evidence of self-contradiction, by showing him to have been sometimes consistent." Here, again, it will be seen that the limitation of the exception is to the purpose of rebutting evidence of self-contradiction. But there is no evidence of self-contradiction on the part of Mr. Bunn, and therefore there is nothing to be rebutted. It is argued, however, that the quotation from Starkie, by Chief Justice GIBSON, covers this case. It is in these words: "Adopting, then, the rule of Mr. Starkie with its exception, that consonant declarations may be given in contradiction of evidence tending to show that the testimony at the bar is a fabrication of a recent date, and to show that the same statement was made before its ultimate effect on the question trying could have been foreseen," etc., etc. The difficulty in the application of the exception, as thus stated, is the absence of the evidence tending to show that the present testimony is a fabri-

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cation of recent date. Where is it? If Mr. Bunn had previously made a statement of the facts in hostility with his present testimony, it might well be said the fact of such discrepancy tends to show that his testimony now is a fabrication. But there is no such testimony, and we are not referred to any other testimony having such a tendency. Without such testimony, there is nothing to rebut or contradict.

It is not necessary to review the numerous cases in which we have held that offers of such testimony cannot be sustained. It is inadmissible in the present case upon very plain principles, and does not come within the operation of any of the cases cited in its support. The case of *McKee v. Jones*, 6 Pa. 425, illustrates the subject quite clearly thus: "Statements by a witness at another time, though admissible to contradict, are not equally so to confirm him. This is the general rule. But consonant declarations may be given in contradiction of evidence tending to show that the testimony at bar is a fabrication of recent date, and to show that the same statement was made before its ultimate effect on the question trying could have been foreseen. . . . Here the witness resided in Kentucky. He was not examined in open court. In his second deposition he denied the truth of all he had stated in his first deposition. The declarations proposed to be proved were made prior to either deposition, and were in accordance with the evidence given on the first commission. It would seem that the case was within the rule in *Craig v. Craig*, 5 R. 91." To bring the present case within the peculiar circumstances which must exist in order to justify the admission of the letter in question, it would have to appear that Mr. Bunn had at some other time either testified or spoken in contradiction of his present testimony, and then, in order to corroborate his present testimony, his declarations on a still previous occasion might be admitted. There are no such facts in the case, and certainly neither he nor his counsel would admit that there were. We are therefore of opinion that the letter of December 26, 1884, was improperly admitted, and the first assignment of error is sustained.

The other assignments are without merit. The conversation testified to by Mr. Lindsey was a part of the *res gestæ*. It was proof of the official notification by Mr. Bunn to him, Lindsey, the city editor, of the change in the management and control

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of the paper. Bunn and Jackson were both present; and the witness proceeded to testify that from that time on Jackson was in sole and absolute charge of the paper. The same remarks are true of the conversation offered and admitted in the testimony of Harper F. Smith, who was the business manager of the paper. Such communications were entirely proper, and were altogether consistent with an actual, bona fide transfer of the paper. The book entries proved by the testimony of the same witness were of the same description. They were evidence of the genuine character of the transfer.

Judgment reversed, and a new venire awarded.

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170	248
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190	465
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ESTATE OF H. C. FLICKWIR, DECEASED.

APPEAL BY C. W. JORDAN ET AL. FROM THE ORPHANS' COURT
OF PHILADELPHIA COUNTY.

Argued March 31, 1890—Decided October 6, 1890.

[To be reported.]

1. The rule that interest upon legacies does not commence to accrue until one year after the death of the testator, being one of administrative convenience only, gives way at all times to the testator's intent, whether express, or whether implied from the general scheme of the will, from particular expressions, or from the situation of the legatee, especially with reference to the testator.
2. There is no substantial difference, in legal aspect, between the gift of an annuity for life, and one of the interest or income of a fund for life; nor between the gift simply of interest, and that of interest payable annually: in all these cases, if no actual intent to the contrary appear, the annuity, interest, or income commences to accrue to the legatee at the death of the testator.

Before STERRETT, GREEN, CLARK, WILLIAMS and MITCHELL, JJ.

No. 138 January Term 1890, Sup. Ct.; court below, number and term not given.

On May 28, 1888, Hannah C. Flickwir died, leaving a will,

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duly admitted to probate, giving to various individuals, some of whom were described as collateral relatives either of the testatrix or of her deceased husband, devises of real estate and pecuniary legacies; to her executors, upon certain trusts, pecuniary legacies aggregating \$60,000; to various religious and charitable organizations legacies aggregating \$130,000, and to Clara W. Jordan, Sophia Beebe, Thomas W. Sparks and Anna M. Sparks, children of a deceased nephew of the testatrix, the residue of her estate. Harry F. West and Thomas W. Sparks were appointed executors. The will, in item 56, declared that no legacy or devise should abate by reason of the death of a legatee or devisee in the lifetime of the testatrix, but that, in such event, the persons who would be the representatives or distributees of the deceased legatee or devisee, should succeed thereto; that all collateral inheritance tax should be paid out of the residuary estate, and that, in the event of a deficiency of assets, the legacies given to individuals should be paid in full, in preference to those given for public or charitable uses.

The legacies given to the executors, in trust, were bequeathed by items 4, 14, 15, 21, 38, 40 and 45 of the will. In each case the trusts declared were to pay the interest and income of the bequest to a certain person for life, and at his decease to pay the principal to his children or other relatives. Some of the beneficiaries for life were described in the will as collateral relatives of the testatrix or her husband. In two instances, a separate use for the benefit of the beneficiary for life, was created. Exclusive of such provisions, the bequests to the executors were all substantially in the following form:

"I give and bequeath to my executors, hereinafter named, the sum of — dollars, in trust, nevertheless, to pay the interest and income to A. B. for life, and at her decease to pay the principal to C. D.," etc.

The executors settled an account showing a balance for distribution sufficiently large to pay all the particular legacies and leave a residuary estate of about \$77,000. This account was called for audit before FERGUSON, J., when the beneficiaries for life, under the bequests to the executors, asked the court to award to them interest from the death of the testatrix upon the respective sums so bequeathed. The auditing judge subsequently filed an adjudication awarding "to the several per-

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sons named as cestuis que trust in the items of the will above recited, interest on the several sums named therein, from the time of the death of the testatrix," and reported a distribution accordingly.

Exceptions to the adjudication, filed by the executors, were dismissed after argument before the court in banc, opinion by ASHMAN, J.:

It is a fair subject for criticism that the only one of the exceptants who has a right to complain because the decree affects him as a residuary legatee, has been careful to object as an executor, in which capacity he is a mere stakeholder and has no standing whatever. But the question at issue will not be decided upon a technicality.

The testatrix gave separate sums to the executors, in trust to pay the income of each fund to its respective beneficiary for life. Did the gift include the income which accrued during the year commencing at the death of the testatrix? We think that it did, for the reason that it was a distinct gift of a yearly sum to the legatee, which is the definition of an annuity; and annuities, where the testator has not declared to the contrary, have always been exempted from the rule which postpones interest upon legacies until the end of a year from the death. The donee of a sum in gross receives all that the donor intended, when he is paid that sum at a time fixed for distribution; the donee of a yearly sum for life or a less term receives less, if one year is cut out from that period. In the one case, interest is a mere adjunct to the legacy, and may be withheld without impairing the substance of the gift; in the other, interest is itself the legacy, and must be paid in full, or the legacy will be diminished. Another point of difference is, that, as a rule, arrears of annuity will not carry interest. See cases in Theobald, 57.

The decision in this case must rest upon the distinction we have noted between the two classes of gifts, and not upon the accidental fact that the testator may have stood in loco parentis to the legatees, or that the gifts may have been intended by way of maintenance, of neither of which incidents we concede there is any indication in the will. The distinction is so far from being subtle, that it is entirely reasonable, and it has the additional merit of being easily applied. It relieves also against

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the search for an obscure intention on the part of a testator. The Supreme Court has recognized it in cases where an objection was present which does not appear in this instance. In Penna. Co.'s App., *Brown's Est.*, 41 Leg. Int. 26, the gift was of \$120,000 to trustees "as soon as the same can be conveniently raised and paid out of my estate by my executors, in trust to pay and divide the income," etc. The fund was not in existence at the death of the testator, and the executors had one year in which to pay it over to the trustees; yet the cestuis que trust were held entitled to interest from the date of the death. Here there is no such intermediary process, and no consequent delay. Upon the strength of the ruling in that case, and in the cases of *Eyre v. Golding*, 5 Binn. 472; *Cooke v. Meeker*, 36 N. Y. 15; and *Hilyard's Est.*, 5 W. & S. 30, to which we simply refer, we dismiss the exceptions and confirm the decree of the auditing judge.

Thereupon Clara W. Jordan, Anna M. Sparks and Thomas W. Sparks, three of the residuary legatees took this appeal, specifying that the court erred:

6. In dismissing the exceptions and awarding interest upon the trust legacies from the death of the testatrix.

Mr. John Douglass Brown, Jr., for the appellants:

1. The court was in error in supposing that income was received by the executors upon the amount of the trust legacies during the year following Mrs. Flickwir's death. This was not claimed at the audit, and is not true in point of fact. The account shows that within four months after her death the executors commenced to dispose of securities and convert the entire estate into cash. Undoubtedly something was realized by way of income during the year, but no income accrued on these trust legacies specifically. This is a material point, as in *Townsend's App.*, 106 Pa. 268, the fact that the specific securities appropriated to the trusts had borne interest during the year, was given considerable weight. *Cooke v. Meeker*, 36 N. Y. 15, is authority for the decision in *Townsend's Appeal*, but cannot be stretched to cover the present case, there being here no direction to transfer securities, no securities transferred, and no income which can in any way be associated with these trust legacies.

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2. These bequests are not gifts of annuities, and the law relating to annuities is not applicable. There is a difference between a bequest of money for the life of the legatee, and a bequest of a sum to be paid annually for life: *Eyre v. Golding*, 5 Binn. 472. The real question in the case is, whether, in the absence of a parental or quasi parental relationship between the testator and the beneficiary, and in the presence of a sufficient reason for creating a trust, entirely distinct from any purpose to secure to the beneficiary interest from the testator's death, appearing upon the face of the will, a legacy such as those involved in the present case, will be treated as an annuity during the year intervening between the death of the testator and the payment of the principal to the trustees, without the expression or implication of such an intention on the part of the testator.

3. Legacies are payable at the expiration of one year: § 51, act of February 24, 1834, P. L. 88; Woerner on Administration, § 454; and interest upon them is payable from that time, unless a different time is fixed by the will: Woerner on Administration, § 458. The exceptions to this general rule are: specific legacies; annuities; legacies of income of residuary estate for life; legacies to one toward whom the testator stood in loco parentis; legacies in lieu of dower; cases in which a different intention is expressed by the testator; and legacies for maintenance. Obviously the two last heads are the only ones with which we are concerned in this case. There could be no question that the law is as stated by Mr. Chief Justice TILGHMAN in *Eyre v. Golding*, supra, were it not for the later cases of *Hilyard's Est.*, 5 W. & S. 30, and *Penna. Co.'s App.*, 41 Leg. Int. 26. The former is not sustained by the cases on which the decision is rested in the opinion, as is pointed out in *Steiner's Est.*, 13 Phila. 358. The report of the latter does not give the language of the will.

4. The old rule, under which the testator's intention is of controlling effect, does not seem to have been weakened by *Hilyard's Estate* and *Penna. Co.'s Appeal*, if we may judge from the decisions in *Townsend's App.*, 106 Pa. 268, and *Middleton's App.*, 103 Pa. 92. The use of the word "annual," or "yearly" in the will, would have converted the legacies into annuities, because manifesting such an intention: *Eyre v.*

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Golding, 5 Binn. 472; Lynch's App., 12 W. N. 104. It is the omission of that word here, and of any indication of an intention to employ it, that we rest upon. The courts will not treat a legacy as an annuity unless an intention express or implied, specially to favor the legatee, is present. The court below expressly conceded, as a fact in this case, that there were no indications warranting the inference of such an intention on the part of the testatrix. Sufficient reasons for the creation of the trusts appear, part of them being separate use trusts, and the others being necessary to preserve remainders.

Mr. Frederick J. Shoyer and Mr. H. S. P. Nichols, for the appellees:

No error has been assigned to the finding that the estate was invested at the death of the testatrix in interest-bearing securities. It is therefore conceded that interest was earned, or should have been, and the question of the production of income does not arise in the case. The will as a whole shows the evident intent of the testatrix to provide for her relatives and those of her husband, and that the first takers should be the primary objects of her bounty. The residuary legatees were not such in any sense. By the terms of the various bequests, interest is payable upon these trust legacies from the date of her death: *Eyre v. Golding*, 5 Binn. 472; *Spangler's Est.*, 9 W. & S. 135; *Hilyard's Est.*, 5 W. & S. 30; *Penna. Co.'s App.*, 41 Leg. Int. 26; *Cooke v. Meeker*, 36 N. Y. 15; *Townsend's App.*, 106 Pa. 268; *Bird's Est.*, 2 Pars. 168; *Steiner's Est.*, 13 Phila. 358. The act of February 24, 1834, P. L. 83, making legacies payable in one year from the testator's death, does not apply to a bequest of income. The executors were themselves to hold the money for the benefit of the cestuis que trust, and there was no occasion for a payment over to trustees, as they already had in their hands funds, earning interest, applicable to the payment of the sums here claimed.

OPINION, MR. JUSTICE MITCHELL:

The act of February 24, 1834, § 51, P. L. 83, provides, that "legacies, if no time be limited for the payment thereof, shall in all cases be deemed to be due and payable at the expiration of one year from the death of the testator." As interest only

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accrues by contract, or as damages for default of payment of money which is due, it followed that the deferring of the period of payment, also postponed the accrual of interest until a year from testator's death. This is therefore the general rule, and it was the well-settled rule of the common law, long prior to the date of the statute. It is, however, purely a rule of administrative convenience. It has no other merit. Certainly, to take an example from the case in hand, there is no inherent equity in mulcting the primary legatees of a solvent estate in a year's income, for the benefit of the residuaries, presumably the lowest in the scale of the testator's intended bounty. Being a rule of convenience only, it gives way at all times to the intent of the testator, whether express, as provided for in the statute itself, or implied from the general scheme of the will, or from particular expressions, or from the situation of the legatee, especially with reference to the testator. Certain exceptions, therefore, arising primarily from the testator's intent, have become as firmly established as the rule itself. The one with which we are specially concerned is the case of an annuity, or its practical equivalent, the interest of a sum of money. It is settled that an annuity, given as such, commences from the testator's death: *Roper on Legacies*, *877. In *Gibson v. Bott*, 7 Ves. Jr. 96, Lord ELDON said that that was certainly the rule, but he remembered when it was not clear. In the same case, he states that if a legacy is given for life, with remainder over, no interest is payable until the second year, and intimates that that is also the rule where a sum is given to be placed out to produce an annuity. On this authority, *Roper* lays down the rule that interest on a gross sum, given as an annuity, does not commence till a year after death. *Roper*, however, says there is no express decision to this effect, and *Toller* says the point is doubtful: *Toller on Executors*, 324.

This was the state of the authorities when the point came before this court, and the distinction intimated by Lord ELDON was repudiated. In *Eyre v. Golding*, 5 Binn. 472, the gift was to R. of "the interest of £400, to be paid her annually during her natural life." Chief Justice TILGHMAN held that interest was payable from the date of testator's death, saying: "The devise is not of a gross sum, but in the nature of an annuity. . . . The first payment of the annuity must be made

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at the end of the first year, or the intention of the testator is not complied with. You must count the time immediately from his death, or the legatee will not receive the annuity *annually* during her life." **TILGHMAN** laid much stress on the word "annually." But in *Hilyard's Est.*, 5 W. & S. 30, the bequest was "in trust to place the same out at interest and pay the interest and income thereof, when and as the same shall be got in and received, unto my sister K., for and during all the term of her natural life." The word annually did not occur at all, and yet **SERGEANT, J.**, says: "Between *Eyre v. Golding* and the case before us I perceive no difference. Interest is in its nature an annual profit; and a direction to pay interest makes it payable annually without anything further." After stating the general rule, he proceeds: "Where, however, it was not a bequest of the corpus, but of an income or annuity, there a contrary rule prevails, and the legatee of interest for life has been allowed it from the death of the testator." It will be observed that in this connection income and annuity are treated as synonymous by Justice **SERGEANT**, and by his reporters in their syllabus, just as interest payable annually, and annuity, had been treated by Chief Justice **TILGHMAN** and by Mr. Binney, in reporting *Eyre v. Golding*.

Hilyard's Estate was decided after full review of the English chancery authorities, and has been considered as settling the law. It was followed in *Spangler's Est.*, 9 W. & S. 135, where **GIBSON, C. J.**, says: "Where the corpus of the legacy is interest accruing on a residue after payment of debts, and not the residue itself, it is well settled that unless a contrary intent is collectible from the tenor of the will, the legatee is entitled to all that is made from the death of the testator." And in *Pennsylvania Co.'s App.*, 41 Leg. Int. 26, the auditor held that there was no difference between income and annuity, and this court affirmed the decision in a *per curiam* opinion, although in this case, as in *Hilyard's Estate*, there were expressions in the will which might afford ground for argument that the testator's actual intent was to postpone the commencement of the interest for a period after his death.

These cases are authoritative on the present contention. But even if they were less so, they should be followed as consonant to sound reason. There is no substantial difference in

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legal aspect between the gift of an annuity for life, and of the interest or income of a fund for life; nor between the gift simply of interest, and of interest payable annually. Interest accrues *de die in diem*, but it is calculated at a rate *per annum*. In the popular understanding, it is chargeable annually and payable the same way, unless custom, or contract, or specific direction makes it payable at shorter intervals. The idea is so clearly implied, that the actual use or omission of the word *annual* in the will does not seriously affect the intent and purpose of the testator. To make distinctions, which depend, not on his intention, but on the skill of his draughtsman, is contrary to reason and sound law, and is not to be encouraged.

Decree affirmed at the cost of the appellants.

C. F. SLOAN v. H. C. SCHOMAKER, ET AL.APPEAL BY DEFENDANTS FROM THE COURT OF COMMON
PLEAS NO. 3 OF PHILADELPHIA COUNTY.

Argued April 1, 1890—Decided October 6, 1890.

[To be reported.]

- (a) In an action for false imprisonment and malicious prosecution, the plaintiff's testimony showed that he went with his father to the defendants' store, to complain of an alleged insult to his mother a few days previously, and in a violent manner remarked that he would like to thrash the man who insulted her.
- (b) The defendants, having twice ordered the plaintiff and his father to leave the store, sent for an officer and told him to arrest them. The officer took them before a magistrate on a charge of "breach of the peace in using threats and inciting to riot." They were committed for trial, but afterwards discharged on habeas corpus:
1. The plaintiff's own case showing that he was in the wrong, that when arrested he had no intention of obeying the order to leave the store, and that the substantial charge, to wit, the breach of the peace, was true, he was not entitled to recover either for false imprisonment or malicious prosecution.
 2. Whether to a declaration charging false imprisonment and assault and battery, an amended statement of claim may be filed, under the act of May 25, 1887, P. L. 271, charging, additionally, that the defendants falsely and maliciously and without probable cause directed and procured the arrest of the plaintiff, not considered.

Statement of Facts.

Before STERRETT, GREEN, CLARK, WILLIAMS and MITCHELL, JJ.

No. 172 January Term 1890, Sup. Ct.; court below, No. 204 December Term 1886, C. P. No. 3.

On December 1, 1886, Charles F. Sloan brought trespass against Henry C. Schomaker and Henry W. Gray. The plaintiff subsequently filed a narr charging, in the first count, a false imprisonment, and in the second, an assault and battery of the plaintiff by the defendants. The defendants pleaded not guilty. The issue thus formed was tried October 24, 1887, when a verdict for the plaintiff for \$2,500 was rendered, upon which judgment was entered. Subsequently the judgment was opened and a rule for a new trial was made absolute.

On April 15, 1888, by leave of the court, the plaintiff filed an "additional statement of his claim," drawn under the provisions of the procedure act of May 25, 1887, P. L. 271, averring that the defendants falsely and maliciously, and without probable cause, directed and procured the arrest of the defendant, charged him before a magistrate with breach of the peace and inciting to riot, and caused him to be committed to prison, etc. In pursuance of a rule to plead, the defendants entered the plea, not guilty.

At the second trial on October 21, 1889, the following facts were shown:

The defendants were officers of the Schomaker Piano-forte Manufacturing Company. On May 25, 1885, between nine and ten o'clock A. M., the plaintiff, accompanied by his father, entered the company's store at No. 1109 Chestnut street, and stated to the defendant, Schomaker, that his mother had been a customer in the store a few days previously, and that the clerk who waited upon her had insulted her. Mr. Schomaker said that he knew nothing of it, and that Mr. Gray, the other defendant, had waited on the lady when she was in the store. As to the subsequent occurrences, the plaintiff testified:

"Mr. Gray then came over to where we were, and I asked him why he had insulted my mother? I asked him why he asked her if she was the keeper of a fancy house, and he told me to get out of the store. Father then spoke up and asked him if he asked her if she kept a fancy house? He said, 'Suppose

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I did, what are you going to do about it?' I then told him he would have to prove it. He then told a party, I did not see who they were, to go and get an officer. The officer was close by and came in almost immediately. When the officer came in we were moving to the door and almost got there. Mr. Gray said to the officer, as he came in, 'Arrest these men!' The officer said, 'What for?' Mr. Gray said, 'Arrest them and I will make a charge against them.' The officer then said to us, 'You will have to go with me.' As we were going out of the store he turned back to Mr. Gray and said, 'You will have to come down.' He said he would be there. The officer then took us down Chestnut street to the corner of Sixth, and then said for us to wait to see if Mr. Gray was coming. We went with the officer to Magistrate Durham's office, which was then on Sixth above Chestnut."

After stating that the witness and his father were committed by the magistrate, and were taken to the central station, and afterward to the Moyamensing prison, where they remained three days, until they were released on bail, the plaintiff testified further:

"The conversation between me and Mr. Gray occurred in the front part of the store, near the door, and I said we were going out when this conversation took place. When the officer entered we were about ten or fifteen feet from the door. I did not use any violent language toward Mr. Gray, nor use any threat. At the time this conversation took place, the only ones I remember present were Mr. Schomaker and Mr. Gray, and some young men I do not remember."

Cross-examined. ". . . . When we went in I don't recollect what Mr. Gray was doing; he came over from the rear of the store to where we were. I think Mr. Schomaker said something to Mr. Gray as he was coming to us. He came over to us; when we came together we were not far from the door, we were about ten or fifteen feet. . . . Q. Did you say, if you had the man who insulted your mother you would like to thrash him? A. I think I did, to my father; possibly Mr. Schomaker might have heard it. I don't know whether it was addressed to Mr. Gray or Mr. Schomaker. I believe I made that remark to my father, that if I had the clerk who insulted my mother I would like to thrash him. Mr. Gray did not tell us it was a

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mistake, the lady was not insulted and that we must go elsewhere to get satisfaction, I was interfering with his business and must go away. . . . Mr. Gray told me to leave the store twice before the officer came. Q. What time intervened between the first and second time? A. Part of a minute. While we were standing there quietly, he sent for an officer. . . ."

Leander Sloan, the plaintiff's father, testified: "We stated to Mr. Schomaker our grievance. We stated to Mr. Schomaker who we were. My son had the first conversation with him. He said his mother was in the store previous on business, and one of the clerks had insulted her. Mr. Schomaker said he knew nothing about it. He said Mr. Gray must have been the man who was waiting on her. Mr. Schomaker was slightly acquainted with my wife. Mr. Schomaker called Mr. Gray. My son said, as nearly as I can remember, if he was the man dealing with his mother; I think he said, you must be the man who insulted my mother. He seemed to be in a passion, and ordered us out of the store. I asked him if he asked my wife if she kept a fancy house. He said 'Supposing I did, what are you going to do about it?' He said, 'Get out of my store, both of you, or I'll kick you out.' I was trying to get some explanation, and he sent out for a police officer. I did not feel afraid of an officer. They sent for an officer and said, 'Arrest these men, I will make a charge against them.' The officer said 'You will have to come with me.' We went quietly. We were in the store about five minutes. I think he, my son, said it to me, that he felt like thrashing the man who insulted his mother. There was no profane language used on either side. We were a short distance from the door. The front door was shut during the conversation. There was no crowd in front of the store, far from it. We made no more noise in the store than an ordinary conversation."

The plaintiff put in evidence the docket of Magistrate Durham, showing the arrest of Charles Sloan and Leander Sloan by officer Dannenhower, charged with "breach of the peace in using threats and inciting to riot," and a binding over of said defendants, after hearing, to appear at the next Court of Quarter Sessions to answer the charge. It was also shown that the plaintiff and his father were afterwards discharged upon habeas

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corpus, by ALLISON, P. J., sitting in the Court of Quarter Sessions.

The plaintiff having rested, the defendants presented testimony tending to prove that the plaintiff and his father, although assured by the defendants that there had been no insult, behaved in a very boisterous and violent manner, threatening fight and making such a noise as to drive away customers who were in the store, and cause quite a crowd to collect in front of it; that they remained in the store for about twenty minutes, although repeatedly ordered to leave, and that when one of the defendants said he would send for an officer to put them out, one of the Sloans replied, "Damn your officer; send for him;" that immediately upon the officer's coming, they quieted down; that the defendants were directed by the officer to go to the office of the magistrate, and when they did so, they said nothing until called to the stand as witnesses, the charge against the plaintiff being made by the officer himself.

At the close of the testimony the court, GORDON, J., charged the jury as follows:

This is an action of trespass by force and arms, where the plaintiff seeks damages for personal injuries, alleging unlawful arrest and restraint of liberty. When a citizen complains that he has been injured, he is entitled to a faithful hearing.

This happened in the store of the defendants; and it consisted in the arrest of the plaintiff by a police officer directed by the defendants. No one has a right in a dwelling or a store of another, unless upon an invitation express or implied. When one enters a public store by implied permission, it is his duty to leave, when ordered, with reasonable speed. The owner can use reasonable force to eject an intruder, or obtain an officer of the beat to do so; and if the intruder remains after he is ordered out, the owner would not be responsible for the consequences.

He who charges another with crime and by reason of the charge restrains him of his liberty is responsible if the arrest is false. [If the plaintiff's story is to be believed, as the plaintiff and his father have told it, it is a case entitling the plaintiff to recover.]³ If the defendants' story is to be believed that makes a good defence.

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There is a conflict of testimony from the beginning to the end. The plaintiff says he entered the place to make inquiry respecting an insult to his mother, and that he was met by an almost immediate order by Mr. Gray for an officer to arrest him. The plaintiff says he was peaceable and made no noise. If this was true, the arrest was illegal and an injury to the plaintiff, and the defendants are responsible in damages. [If the plaintiff tells the truth, Mr. Gray was the aggressor, and he is, in whole or in part, substantiated by his father.]⁸

Mr. Gray testifies that he came towards the front of the store and had a conversation with the plaintiff, and he told him it was a mistake, and attempted to give reasonable explanation, but the plaintiff became very noisy and threatened to mash some one; that Mr. Gray then sent his son for a police officer, and when the officer came, Mr. Gray told him to take the plaintiff and his father out and to arrest them. If that is so, Mr. Gray cannot be held responsible. . . .

An act of a police officer must be justified by facts in order to relieve the party from responsibility. If Mr. Gray did not make the charge he is not responsible. If all that he did was to be sworn as a witness, and then told the truth, what the magistrate then did would not make Mr. Gray responsible.

If you find for the plaintiff, you will be brought to the question of damages, and in fixing the damages, reason and good sense ought to be your guide. If, technically, the arrest was unlawful, but contributed to by the plaintiff, the damages should be nominal. The damages are to be governed by the manner of infliction, and the character of the injury.

The defendants request the court to charge:

1. The defendants are not liable for a mistake of the officer in preferring the charge before the magistrate; nor for the mistake of the magistrate in committing the plaintiff to prison.

Answer: Affirmed.

2. The entrance by the Sloans of the defendants' store during business hours, not on business, but for the purpose of obtaining an explanation or satisfaction for an alleged insult to Mrs. Sloan, was by sufferance only, and it became their duty to leave the store immediately, when ordered to do so, and to seek their redress, if entitled to any, according to law; and if they did not, they became resisting intruders liable to be removed by force.

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Answer: Affirmed. •

3. For the plaintiff to go into the defendants' store during business hours, and there to accuse them of insulting his mother, and to follow up the accusation by saying to them, "I feel like thrashing the man that insulted my mother," or, "I want satisfaction, and want to mash the man who insulted her," was an unjustifiable act, in view of the time and the place, and such language was threatening language, and tended to provoke a breach of the peace, and it justified the defendants in ordering the plaintiff into the custody of the officer, without being answerable in damages for so doing, as in such case the arrest was provoked and justified by the illegal conduct of the intruders themselves.

Answer: Affirmed.

4. If the conduct of the Sloans in the defendants' store was so threatening and noisy as to attract a crowd in the public street in front of the defendants' store, such conduct was in itself a breach of the peace and justified the plaintiff's arrest, and your verdict should be for the defendants.

Answer: Affirmed.

The jury returned a verdict for the plaintiff for \$1,000. A rule for a new trial having been discharged, judgment was entered, when the defendants took this appeal, specifying that the court erred:

1. In permitting the plaintiff to amend his declaration by adding a count for malicious prosecution.

2, 3. In charging the jury as set forth in []^{2 3}

Mr. Amos Briggs, for the appellants:

1. Prior to the act of May 25, 1887, P. L. 271, counts for false imprisonment and for malicious prosecution could not have been joined, the two offences being essentially different in their nature, and the limitation of actions therefor being different. The act of 1887 contains no warrant for joining them. Nor can the plaintiff introduce by amendment a new cause of action, or one differing substantially from the cause which he has declared and joined issue on, and maintain both: *Gardner v. Post*, 43 Pa. 19; *Root v. O'Neil*, 24 Pa. 326; *Royse v. May*, 93 Pa. 454.

Arguments.

2. The degree of weight to be given to the testimony of each witness, is for the jury, not the court, and the judge's manner of referring to the witnesses in this case was error: *Ott v. Oyer*, 106 Pa. 17; *Penna. Canal Co. v. Harris*, 101 Pa. 92. But the fact is clearly established by the testimony of the Sloans themselves, that they were the aggressors, and it was erroneous for the court to tell the jury that, if true, it made Gray the aggressor. In any event, the defendants are not liable for the conduct of the officer after he had removed the Sloans from the store: *Gilliford v. Windel*, 108 Pa. 146. On the conceded facts, they brought about and provoked their own arrest.

Mr. Charles A. Chase (with him *Mr. Thomas W. Barlow* and *Mr. Charles C. Lister*), for the appellee:

1. The amendment to the pleadings was not the addition of a count for malicious prosecution. The plaintiff filed simply a statement of the facts upon which his suit was brought. Having pleaded to and gone to trial under it, the defendants cannot now insist on the objection which they seek to raise: *Erie Iron Works v. Barber*, 118 Pa. 6. The plaintiff, however, had a clear right to make the amendment. Whether the facts alleged in the statement of claim would have brought the cause of action stated under the head of case, or that of trespass, is of no importance since the act of May 25, 1887, P. L. 271: *Jones v. Gordon*, 124 Pa. 263; *Erie Iron Works v. Barber*, supra; *Williams v. Hay*, 120 Pa. 485.

2. The defendants cannot complain of the parts of the charge assigned for error, which must be considered in connection with the other parts of it: *Horton v. Coal Co.*, 2 Penny. 26; *Commercial N. Bank v. Henninger*, 105 Pa. 496. Nor can they complain of a failure to give binding instructions which they did not ask for: *Penna. R. Co. v. Page*, 21 W. N. 52. Such instructions, however, they were not entitled to ask for. If the testimony for the plaintiff is true, as the jury have found to be the case, the defendants are responsible for ordering an illegal arrest, made when the plaintiff was quiet, peaceable and orderly, and after he had started to go out and had actually gone a distance of forty feet toward the exit.

3. The answer to the argument that the defendants owned

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the store and therefore had a right to put the plaintiff out, is very simple; they neither did nor attempted it. What they intended to do was to prosecute him for a crime unknown to the law. The jury have found that he was actually prevented from leaving the store by the violent conduct of the defendants, and by their sending for an officer and having him make the arrest. A party who procures or abets an illegal arrest, or joins in a prosecution without probable cause, is liable in damages: *Baird v. Householder*, 32 Pa. 168; *Sullivan v. Jones*, 2 Gray 570; *Cole v. Radcliffe*, 4 W. Va. 332; *Huggins v. Toler*, 1 Bush 193; *Frantz v. Lenhart*, 56 Pa. 365; *Kramer v. Lott*, 50 Pa. 495; *Harris v. Bennet*, 1 Phila. 175; *Cotton v. Huidekoper*, 2 P. & W. 149; *Walbridge v. Pruden*, 102 Pa. 1.

OPINION, MR. JUSTICE MITCHELL:

On the evidence in this case it is entirely clear that plaintiff was not entitled to recover. He went to defendants' store upon an errand that was likely to produce a breach of the peace. The charge, if true as he believed, would naturally and properly make him indignant, and that this was his frame of mind appears from the remark which he admits making, that he would like to thrash the man who insulted his mother. On the other hand, such a charge made persistently to the interruption of business, and especially if unfounded or erroneous, would naturally provoke a hostile spirit on the part of defendants. It did so, and Gray ordered plaintiff out of the store. Both plaintiff and his father admit that this order was given to them twice. It was their legal duty to go. In strict law, defendant might then have used sufficient force to put them out with his own hands. Instead of doing so, he adopted the prudent and commendable course of sending for an officer. Some effort was made by counsel to show that plaintiff and his father were going out, when the officer arrived and arrested them, and plaintiff did testify: "When the officer came in we were moving to the door, and almost got there." But the evidence on the part of plaintiff as a whole shows clearly that he had no intention of going out. He says: "When the officer entered we were about ten or fifteen feet from the door;" and yet, on cross-examination, he says Gray "came over to us; when we came together, we were not far from the door, we were about

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ten or fifteen feet." Evidently, what movement there was towards the front of the store was during the interview with Schomaker when they first went in, and not during or after the interview with Gray, in which the orders to leave the store were given. And the spirit in which the plaintiff acted is shown by his father's testimony, that Gray "sent out for a police officer. I did not feel afraid of an officer." It is thus apparent on plaintiff's own evidence that he was in the wrong. It was his duty to leave when ordered to do so. Under the circumstances, as he viewed them, his indignation, as already said, was natural and proper, but the law is plain, and it cannot be too distinctly understood that the public peace is above all considerations of private insult, and those who undertake to get satisfaction by their own acts, especially by going to the other party, after a lapse of time, must be careful to keep within the legal limits, or they will have only themselves to blame for the consequences. The learned judge in his answers to the points laid down the law correctly to the jury, but he took too lenient a view of plaintiff's conduct, and the instructions that "if plaintiff's story is to be believed, he is entitled to recover," and "if plaintiff tells the truth, Gray was the aggressor," cannot be sustained.

The count for malicious prosecution was not included in the original narr, but was added subsequently; but, even if it had been regularly joined at first, the plaintiff's case under it would have been fatally defective. Passing by the question whether defendants ordered the prosecution, or took such part in it as would render them liable, the magistrate's docket shows the charge to be "breach of the peace in using threats and inciting to riot;" and, though riot is rather a large word for the occurrence, yet there were enough persons concerned to have made it a technical riot, and the plaintiff's own evidence shows that the substantial charge, breach of the peace, was not only not without probable cause, but was true in fact. Under no view of his own evidence should he have been allowed to recover.

As this view of the merits disposes finally of the whole case, it is not necessary to consider the question of the amendment, nor the effect of the procedure act of 1887 on the heretofore established rule that no amendment can be allowed which introduces a new cause of action.

Judgment reversed.

Statement of Facts.

D. J. HOLLAND v. R. H. TOWNSEND, ET AL.

APPEAL BY DEFENDANTS FROM THE COURT OF COMMON PLEAS
NO. 3 OF PHILADELPHIA COUNTY.

Argued April 3, 1890—Decided October 6, 1890.

[To be reported.]

1. Under § 1, act of March 21, 1772, 1 Sm. L. 370, authorizing the sale of a distress for rent "after six days' public notice," it is not essential to the legality of the proceeding that the sale take place on the day fixed by the notice. As an incident to the power to sell, the bailiff has power to make a reasonable adjournment of the sale.
2. An adjournment for one week is a reasonable delay, and will not of itself convert a lawful distress into a trespass; nor is it necessary, in an action of trespass for a sale made after such adjournment, that the cause of the adjournment should affirmatively appear: *Ricketts v. Unangst*, 15 Pa. 90, and *Quinn v. Wallace*, 6 Wh. 452, explained.
3. A landlord has the right to impound a distress upon the premises for a reasonable time after the expiration of the five days allowed to the tenant by the act of 1772 for bringing replevin, which, ordinarily, will be until the day of sale in due course; and he may take exclusive possession of that part of the premises in which the distress is impounded.
4. The fact that the landlord, after making a distress on his tenants' goods, visited a sub-tenant of a part of the premises, cautioned him to pay no more rent to the mesne tenant, and offered to execute a new lease directly to the sub-tenant for the part of the premises occupied by him, would have no effect upon the legality of the distress.

Before STERRETT, GREEN, CLARK, MCCOLLUM and MITCHELL, JJ.

No. 159 January Term 1890, Sup. Ct.; court below, No. 956 June Term 1887, C. P. No. 3.

On September 3, 1887, Dennis J. Holland brought trespass against Richard H. Townsend and Mary S. Townsend, his wife, trustees, to recover damages for an alleged illegal distress and sale of goods of the plaintiff, and for an alleged eviction of the plaintiff from premises demised to him by the defendants. Issue.

By agreement of the parties, the cause was submitted to the decision of *Mr. George Peirce*, as referee under the act of May 14, 1874, P. L. 166, who subsequently filed a report making the following

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FINDINGS OF FACT.

On December 20, 1886, the defendants executed and delivered to the plaintiff a lease for premises No. 630 Market street, for the term of three years from January 1, 1887, at the rent of \$3,000 per annum, payable in monthly instalments, in advance, the first monthly instalment to be paid January 1, 1887. The demised premises, by the terms of the lease, were to be used by the plaintiff as a liquor store, and it was provided that all necessary repairs and renewals should be made by the plaintiff at his own expense.

At the time of the execution of the lease the Nonantum Worsted Co. occupied all the demised premises above the first floor. Dr. Townsend, one of the defendants, recommended said company to the plaintiff as tenants, and consented that he should sub-let said upper portion of the premises to them, which he accordingly did for the term of one year from January 1, 1887, at the yearly rent of \$1,000, payable in equal monthly instalments in advance.

The plaintiff went into possession January 1, 1887, and immediately proceeded to make extensive repairs, alterations and improvements on the first floor, and fit the same up as a handsome drinking saloon. This occupied nearly one month, so that he did not begin to transact business in said premises until the latter part of January, 1887. In fitting up the saloon, the plaintiff expended for fixtures, etc., the sum of \$1,799.59; and for signs, awnings, furniture, a bar pump and fittings, and cigars, the sum of \$319. In addition, the plaintiff purchased liquors, glassware, and other articles necessary to the prosecution of his business, and the value of such portion thereof as remained on hand on August 31, 1887, was \$152.80.

On August 1, 1887, the plaintiff was indebted to the defendants, under the lease between them, in the sum of \$416.67, being composed of \$116.67, balance of rent due July 1st, in advance, and \$250, one month's rent due August 1st, in advance. On August 10, 1887, the defendants, by their bailiff, R. D. Thompson, levied a distress upon all the personal property of the plaintiff upon the demised premises, for the recovery of said sum due for rent, and costs amounting to \$32.07.

Up to the eighteenth day of August no further action was taken by the defendants, or their bailiff, with relation to the

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distress, except that during the last three days a watchman was stationed by the bailiff to watch the distress. This delay was at the request of the plaintiff, in order that he might have afforded him an opportunity to raise the amount of money due. He did not succeed in raising any money outside of the receipts from sales made in the usual course of his business, but out of these he paid to the bailiff the sum of \$13 on account of rent due.

On August 16, 1887, the plaintiff waived his right to an appraisal. On the morning of August 18, 1887, Lewis F. List, deputy constable for R. D. Thompson, the bailiff, went to the demised premises and there saw the plaintiff, and told him that he had been ordered by the defendants to close the place up, and demanded the keys of the said premises of the plaintiff.* The plaintiff then and there surrendered the keys

* Upon this point, the following testimony was given before the referee. The plaintiff testified: "On the morning of the 18th, I came down to the store between nine and ten o'clock in the morning. As I walked in, I found the bar-tender there and Mr. List, the deputy constable, and two friends of his. He said, 'You have got to leave the place.' I said, 'How is that?' He said, 'Yes, you have to leave the place, and I must get the keys and close this place up.' I said, 'That is strange, who ordered this?' He said, 'The landlord ordered the place closed up.' So I walked out, and he followed me out. He demanded from me the key. I gave him the key. He went out and locked the front door, put a bill up and came back. I said to him, 'Will you allow me time to get some papers and some little matters I have here?' He said, 'Oh, yes; I will allow you that time certainly.' So I picked up some little papers I had, one thing and another and came out. He let me and Mr. Slimmer out the back way, and took the keys from the bar-keeper and let us out the back way. . . . That morning when the constable came, was the first time I knew that they were going to put me out. I did not tell him that I was ready to give up the possession and he could have the keys. When he demanded my keys and I had to give them to him, I supposed I was in the hands of the constable and I would be put out any way, and I showed him how to lock up. I supposed the constable would put me out. When he locked up the place I had nothing further to do; I gave up all hopes then."

Lewis F. List, the deputy of the constable who made the distress, after describing an arrangement entered into at the plaintiff's request, under which the plaintiff was to be given time to enable him to make efforts to raise money, he paying over, on account of the rent due, the receipts of each day from his business, testified further for the defendants: "The receipts were only—one day it was \$5, and the next day \$4, and the next day \$4; there were \$13 in four days' receipts, which he was credited for.

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of the premises to the deputy constable, who, having directed the plaintiff and all other parties present to leave the saloon, and seen them out, locked it up, leaving therein all property which had been levied upon, and posted bills on the premises advertising a sale, in pursuance of the levy and distress, to take place on August 24, 1887, and carried the keys of the premises away with him. The action of the bailiff in demanding and receiving the keys and locking the place up was in consequence of and in conformity with directions received from the defendants.

On August 24, 1887, the bailiff, without notice to the plaintiff and without his knowledge, postponed the sale until August 31, 1887, at which last mentioned time the sale actually took place. No cause is alleged, or reason given, in the testimony before the referee, for this postponement.

Subsequent to the advertisement of the constable's sale, but prior to the sale, Dr. Townsend, one of the defendants, called upon Mr. Harlan, agent for the Nonantum Worsted Co., who was in charge of the company's place of business at No. 630 Market street, and told him that the company's goods on the premises were liable for the rent which the plaintiff had collected from him and failed to pay over to the defendants, and also for the rent due for down-stairs. He further, at this time, cautioned Mr. Harlan against paying any more rent to the plaintiff, and offered to give the company a new lease, to be executed by the defendants directly to the company.

On August 31st, the constable proceeded with the sale, by which he realized the sum of \$473.70. This sum the constable distributed as follows: To the defendants, amount of rent due, less the \$13 already paid, \$403.67; to costs of levy, watchman, advertisements, and sale, \$49.32; and to the plaintiff's bartender two weeks' wages, paid at the request of the plaintiff, \$20; which left a balance due the plaintiff of 71 cents.

Then, after that, I was ordered to see him, and to state that it would be better for him to save the watchman's expenses and to close the place, and to give me the key, as the result was unsatisfactory, the amount of receipts from the day's sales. He said, 'If you want the keys, you can have the keys and close up;' and he went and got the keys and gave me the keys, and showed me the key to the front door and the key to the back door. I finally closed the place up and took the watchman off, and saved the watchman's expense."

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The referee finds the value, at the time of the sale, of the property of the plaintiff on the demised premises, sold by the constable, measured by what it cost to procure the same and put it in place, to be \$900.23.

At the conclusion of the sale on August 31st, the bailiff locked up the demised premises, except that portion occupied by the Nonantum Worsted Co., and, with the knowledge of Dr. Townsend, handed the keys thereof to defendant's attorney, who received them. On the same day, August 31, 1887, the sheriff, under and by virtue of two writs of fieri facias, issued out of the Court of Common Pleas, levied upon the remainder of plaintiff's property upon the demised premises, and sold the same September 9, 1887, for the sum of \$122.50. At said sheriff's sale, the unexpired term of plaintiff in the lease from defendants to him was sold for \$1 to one James Walker, who purchased as the agent of defendants, and who, September 14, 1887, assigned said unexpired term to them. The plaintiff, since August 18, 1887, when he was expelled from the demised premises by the bailiff, has not occupied the same.

On September 5, 1887, there was left upon the demised premises a notice signed by the defendants, per their attorney, directed to the plaintiff, notifying him that in consequence of his failure to pay the rent of the demised premises, in accordance with the provisions of the aforesaid lease to him, the defendants intended to determine the said lease under the power given to them therein, and that, at the expiration of ten days from the date when the notice was left, September 5th, the said lease would absolutely determine; and further notifying the plaintiff to remove from and deliver up possession of said premises at the end of the ten days, to wit: on September 16, 1887.

Upon consideration of the cause, the points submitted and the arguments of counsel, the referee has arrived at and states as applicable to the facts the following

CONCLUSIONS OF LAW.

1. In the state of Pennsylvania, a landlord, when dealing with his tenant's goods under a distress, is held strictly to the exact terms of the act of assembly regulating such proceedings: *Murphy v. Chase*, 103 Pa. 260; *Kerr v. Sharp*, 14 S. & R. 402; *McElroy v. Dice*, 17 Pa. 168; *Brisben v. Wilson*, 60 Pa. 452.

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2. The act of the bailiff is the act of the landlord, and any act of his, at variance with the provisions of the statute, is the landlord's act as well as his: *Kerr v. Sharp*, supra; *McElroy v. Dice*, supra; *Brisben v. Wilson*, supra; *Wells v. Hornish*, 3 P. & W. 33.

3. Although the rent may be due, and the distress lawfully made in the first instance, yet the bailiff may afterwards commit an act in itself a trespass, and, thereby, both he and the landlord would be deemed trespassers ab initio: *Richards v. McGrath*, 100 Pa. 399.

4. Any act of the landlord which deprives the tenant of the beneficial enjoyment of the premises to which he is entitled under the lease, will amount to an eviction and suspend the rent: *Hoeveler v. Fleming*, 91 Pa. 325.

5. If, in consequence of the wrongful acts of the lessor upon the demised premises, depriving him of the beneficial enjoyment thereof, the lessee abandons the premises, it is an eviction; and the intent to evict may be presumed: *Skaley v. Shute*, 132 Mass. 367; *Leadbeater v. Roth*, 25 Ill. 480.

6. By the terms of the act of March 21, 1772, § 1, the landlord, having made the appraisement, is obliged, "after six days' public notice," to sell the goods and chattels distrained. The landlord has no discretionary power as to the time when he shall sell the distress. The act was made for the benefit of the tenant as well as that of the landlord, and it is the right of the former to have the goods sold as early as the directions of the act will admit. It was clearly the intention of the legislature that the landlord should have no discretion to avoid the sale at the expiration of the six days' notice, unless by the consent of the tenant, or prevented from so doing by the payment of the rent or the suing out of a replevin: *Quinn v. Wallace*, 6 Wh. 452. It is possible that the landlord or bailiff would be justified in postponing the sale, if there were but one bidder present: *Ricketts v. Unangst*, 15 Pa. 90; but this should be affirmatively shown by the landlord, and cannot be presumed by the referee: *Murphy v. Chase*, supra; or, the bailiff may postpone the sale at the request of the tenant: *Quinn v. Wallace*, supra; *Wood's L. and T.*, § 546; *Harrison v. Barry*, 7 Price 690; *Fisher v. Algar*, 2 C. & P. 374 (12 E. C. L. R.). A failure to sell the distress at the expiration of the six days'

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notice, in any other case than those above enumerated, is not in compliance with the act of March 21, 1772, and renders the landlord a trespasser *ab initio*.

7. The distress, in the case before the referee, was lawfully made in the first instance, and there was no irregularity committed by the bailiff prior to August 18, 1887.

8. [The action of the defendants in visiting the Nonantum Worsted Co. upon the demised premises, before the time of the constable's sale, without the consent of the plaintiff, and cautioning said company not to pay any more rent to the plaintiff, and offering to execute and deliver to said company a new lease for that portion of the demised premises occupied by it, and the action of the bailiff in expelling the plaintiff, demanding and receiving from him the keys thereof and locking the place up, were acts depriving the plaintiff of the beneficial enjoyment of said premises to which he was entitled under the lease, and constituted an eviction of the plaintiff from said premises by the defendants; and this eviction had the effect of suspending the rent for the month of August, 1887, which was the month then "running on:"]⁹ *Kessler v. McConachy*, 1 R. 435; *Hoeverler v. Fleming*, *supra*.

9. [In expelling the plaintiff from the demised premises, demanding and receiving from him the keys thereof and locking the place up, the defendants were guilty of trespass, and became trespassers *ab initio*.]¹⁰

10. The postponement of the constable's sale from August 24th to August 31st, without the knowledge and consent of the plaintiff was not in conformity with the act of March 21, 1772, and was without authority in law, and constituted the defendants trespassers, and they must be deemed such *ab initio*.

11. The impounding of the goods, upon the demised premises, from the time of the levy until the time of the sale, was not, of itself, unlawful. Under the usage prevailing in Pennsylvania, the goods may be kept on the premises for a reasonable time after the five days have expired, which, in all ordinary cases, would be until the time arrives at which they are to be sold in due course of law: *Waite v. Ewing*, 7 Phila. 195; *Woglam v. Cowperthwaite*, 2 Dall. 68; [but the postponement of the sale on August 24th being an unlawful act, the further impounding of the goods upon the premises became an act of

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trespass on the part of the defendants, and rendered them trespassers ab initio.]¹¹

12. [The plaintiff is entitled to be compensated for the fair value of his property lost by the constable's sale, at the time when and place where it was distrained, not merely what it was worth for removal, but what it would have cost to procure articles of like nature and quality and put them in the same place: *Fernwood Ass'n v. Jones*, 102 Pa. 311.]

13. The plaintiff is also entitled to damages for his eviction from the demised premises by the defendants and the breaking up of his business:]¹² *Garrett v. Cummins*, 2 Phila. 207; *Schlitz Brewing Co. v. McCann*, 118 Pa. 314; *Hoy v. Gronoble*, 34 Pa. 9.

14. In estimating the damages for the injury to the plaintiff by breaking up his business, the amount of his profits for the six or seven months during which he transacted business on the demised premises, may be considered, but it cannot be adopted as an absolutely accurate guide or measure in arriving at the result: *Schlitz Brewing Co. v. McCann*, *supra*; but should be considered in connection with all the other facts of the case. Nothing should be more carefully avoided than an assessment based upon speculative or conjectural profits.

15. The amount of rent due by the plaintiff to the defendants, at the time of the levy, cannot be defalked by the latter in mitigation of the damages assessed by the referee: *Carrier v. Esbaugh*, 70 Pa. 243; *McMichael v. Mason*, 13 Pa. 214; *Wilson v. McElroy*, 32 Pa. 82.

Upon the closing of the testimony, counsel for the defendants presented the following point, and requested the referee to rule thereon:

1. If the jury find that, after the distraint, the defendants, at the request of the plaintiff, allowed him, for a time, to continue his business under an arrangement for the payment of the rent in instalments, and that the plaintiff afterwards waived the appraisement and agreed that the goods levied might remain on the premises until the rent should be paid, and, if not paid previously, then that the sale thereof might take place on the premises, and that, also at the request of the plaintiff, the defendants allowed him to continue the business for a further time under the supervision of a watchman and the agreement of the

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plaintiff daily to pay the receipts of the business to the watchman, and that the last agreement continued until the second day after the waiver of the appraisalment, then these facts are a waiver of the strict compliance with all the formalities of a distress prescribed by the law for cases in which the tenant neither waives nor acquiesces in a departing from them, and, even if the subsequent acts of the defendants do amount to a trespass, he is liable only for the actual damage arising therefrom.

Answer: The referee declines to affirm this point. Such a state of facts would constitute a waiver, by the tenant, of the formalities of a distress, only so far as waiving the appraisalment and the giving of extra time is involved. Immediately upon the landlord's proceeding, by advertising the sale of the distress, such agreement would be, by his own act, terminated, and he should be, from then on, held to a strict compliance with the terms of the statute, and, in the event of a violation thereof, would be a trespasser, and the estimate of damages for such trespass would be in no way modified or altered by the fact of the agreement referred to.⁶

JUDGMENT.

The referee finds in favor of the plaintiff against the defendants and assesses damages at sixteen hundred and fifty dollars and twenty-three cents (\$1,650.23).

Exceptions to the findings and conclusions of the referee, and his answers to points, were filed in court by the defendants, and by writing filed it was agreed between the parties that they should be treated as if they had been duly filed with the referee, whereupon the referee made a supplemental report overruling the exceptions. The exceptions then being renewed before the court, were dismissed after argument, the report of the referee confirmed, and judgment entered thereon. Thereupon, the defendants took this appeal specifying that the court erred in dismissing the exceptions of the defendants:

6. To the answer of the referee to the defendants' point.⁶

9-12. To the referee's conclusions of law.^{9 to 12}

Mr. John G. Johnson (with him *Mr. Rudolph M. Schick*),
for the appellants:

1. The postponement of the sale from August 24th to Au-

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gust 81st, did not make the landlord a trespasser ab initio. The bailiff had power to postpone it, and, in the absence of contrary proof, it must be presumed that his discretion was properly exercised: *Ricketts v. Unangst*, 15 Pa. 90. The remark in *Murphy v. Chase*, 108 Pa. 260, that the ordinary presumption of law as to the taking of all the preliminary steps necessary to an official act has no application to a constable acting as the landlord's bailiff, was made in connection with a failure to show a condition precedent to a sale, viz., the advertisement prescribed by the act of March 21, 1772, 1 Sm. L. 870. All the preliminaries to the existence of a power of sale had been complied with in this case. Grant that the words "shall and may," in the act of 1772, are imperative; they are so only as to the duty to sell, and not as to the direction to sell at the end of six days. The object of the direction is simply to secure at least six days' notice. The referee's decision is rested on an erroneous reading of *Quinn v. Wallace*, 6 Wh. 460.

2. Even if the taking possession of the premises while the goods were under distress was an eviction, such as to suspend the running of rent, it did not render illegal the distress previously made for rent that was in arrear at the date of distress. But it was not an eviction; the landlord had a right to impound the goods upon the premises: *McKinney v. Reader*, 6 W. 86. And the dealings with the Nonantum Worsted Co. did not amount to an eviction. An unsuccessful offer on September 1st, to give that company a lease, could not be such, nor could a caution as to the company's liability and the risk of its paying rent to the plaintiff. Moreover, the referee should have reported how much damages he allowed for what he found to be an illegal distress, and how much for the eviction he found to have taken place. But, if the sale was legal, as we have endeavored to show, no damages can be allowed on account of the distress, either for the value of the goods or for loss to the plaintiff's business. And in any event the damages were excessive.

Mr. Edmund Randall (with him *Mr. James A. Flaherty*),
for the appellee:

1. The common law rule, under which any irregularity will vitiate the whole distress and make the distrainer a trespasser

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ab initio, is in force in Pennsylvania, with all its strictness and severity: *Kerr v. Sharp*, 14 S. & R. 402. The eviction of the tenant by his landlords was a trespass which both suspended the running of rent and nullified the proceedings to distrain ab initio: *Kessler v. McConachy*, 1 R. 435; *Richards v. McGrath*, 100 Pa. 399. And there can be no doubt of the correctness of the finding that there was an eviction. The acts of the landlords show their intention to evict, and such intention is conclusively presumed when by wrongful acts the tenant is deprived of the beneficial enjoyment of the premises: *Skaley v. Shute*, 132 Mass. 367. To forbid a sub-tenant to pay rent to his landlord is an eviction: *Leadbeater v. Roth*, 25 Ill. 480.

2. The act of the landlords in impounding the distress on the premises for more than five days without the tenant's consent, was clearly illegal and vitiated the whole proceeding: *Woglam v. Cowperthwaite*, 2 Dall. 68; *McKinney v. Reader*, 6 W. 34. Under the act of March 21, 1772, 1 Sm. L. 370, the landlord has no discretion as to the time of sale, but must sell as soon as the directions contained in the act will permit, and if he postpone the sale he will become a trespasser: *Quinn v. Wallace*, 6 Wh. 452. The courts have no power to dispense with any of the terms imposed by the statute upon the right to sell: *Davis v. Davis*, 128 Pa. 100. If there can be circumstances justifying a postponement, it is incumbent on the defendants to show that they existed in this case, as the usual presumption of regularity, which applies to legal proceedings, is not applicable here: *Murphy v. Chase*, 103 Pa. 260. Instead of complaining that the damages are excessive, the defendants should congratulate themselves that they are not punitive.

OPINION, MR. JUSTICE GREEN:

We are unable to agree with the learned referee in his conclusion that the postponement of the sale of the plaintiff's goods from the 24th to the 31st of August constituted the defendants trespassers ab initio. The language of the act of 1772, § 1, 1 Sm. L. 370, directing the sale of the distress, is as follows: "And after such appraisement, shall or may, after six days' public notice, lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same," etc. The referee held that the landlord had no discretion to sell after the

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expiration of the six days' notice, except by the consent of the tenant. A decision of this court, however, in *Ricketts v. Unangst*, 15 Pa. 90, to the effect that if there was only one bidder at the sale it would be the duty of the constable to adjourn the sale, induced the referee to say that it is possible that the landlord would be justified in postponing the sale if there were only one bidder present. We said in that case much more than this, to wit: "But the officer ought not to offer the property before an attendance so thin. It would be plainly his duty to adjourn the bidding to another time; and, if he did not, the inference of collusion with the bidder would be so strong that the least spark of evidence would invalidate the sale." Now, this power of adjournment is not put, in the opinion in that case, as an exceptional power justified only by the necessities of the case, but as a clearly existing general power which it would be the plain duty of the officer to exercise in the circumstances stated.

Nor do we see anything in the words of the act of 1772 in conflict with this view. The duty to sell the distress is imperative, and it must be "after six days' public notice," but nothing in the act declares that the sale can take place only on that one day. Many causes may transpire for rendering a sale undesirable, in the interest of the tenant, as also in the interest of the landlord, on the day fixed by the notice. The sudden and severe illness of either the tenant or the landlord, or the death of either party, or the pendency of negotiations, or the occurrence of fire in the building where the distress is impounded at the time of the sale, or the non-attendance of bidders, or very great inadequacy of bids; in short, many quite unforeseen events may readily occur which would make an adjournment quite necessary. The act simply requires a notice of at least six days before making the sale. It is therefore indispensable that a public notice of that length be given, but beyond that nothing is required by the act as a prerequisite to a perfect sale. A power of adjournment is incident to a power to sell, unless an adjournment is prohibited by express words or necessary implication, but there is nothing of that kind in this act. A general power to sell is given, accompanied with no restriction except that six days' notice must be given. We cannot impose any other restriction except

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by exercising legislative power, which of course we cannot do. In this case, an adjournment of seven days took place, when the sale was made. That was not an unreasonable delay, and we certainly cannot see how it could convert a lawful distress into a trespass. There is no authority for such a proposition, nor any recognized principle, derived from a reading of the act of 1772 or from any other source, which requires such a ruling. The learned referee thought the cause of adjournment should appear affirmatively by testimony, otherwise the whole proceeding was invalidated. That might be so if a statutory duty to sell on a certain fixed day were established, but in the absence of such a prerequisite to the validity of the sale, an inference of invalidity does not arise merely because of a short and not unreasonable adjournment. The referee misconceived the decision in *Quinn v. Wallace*, 6 Wh. 452, in supposing that it declared a sale void if made after the expiration of the six days' notice, as that question did not arise.

We cannot agree that the act of the landlord in taking possession of the premises and impounding the distress thereon was an eviction. The evidence was very clear that, after the warrant was in the officer's hands, the landlord and tenant agreed that the latter might remain and carry on his business, upon his undertaking to pay fifteen dollars per day on account of arrearages of rent. He remained a short time, but did not keep his agreement; and it was not until this arrangement had proved to be a failure that the landlord proceeded with his distress. He then impounded the distress which remained on the premises and proceeded to sell it. The referee finds that there was nothing irregular up to this time, August 18th, the tenant having consented not only to the delay but to the acts of the landlord done prior to the 18th. He also finds that the impounding of the goods on the premises from the time of the levy to the time of the sale was not unlawful. But he finds that in demanding the keys of the tenant and expelling the tenant from the premises, the landlord was guilty of an eviction and became a trespasser *ab initio*. So far as impounding the goods on the premises is concerned, there can be no doubt that, by the long-settled law of this commonwealth, the landlord has the right to do so, and to take exclusive possession of that part of the premises in which the distress is impounded. It

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was so held in *Woglam v. Cowperthwaite*, 2 Dall. 68, and it was decided that notwithstanding the right to impound on the premises was omitted from our act of 1772, it was the landlord's right at common law, and by long usage the practice had prevailed both before and after the passage of the act, and, further, that the right to impound on the premises continued at least during the five days allowed for the tenant to replevy.

In *McKinney v. Reader*, 6 W. 34, it appears from the statement of facts in the opinion of the court, that the landlord had impounded the goods distrained, by locking them up in the bar-room, keeping the key himself, and had kept possession of the bar-room for six or eight days, and the court below had charged that this was illegal, unless it was done by consent of the plaintiff's wife. Mr. Justice KENNEDY, in the course of a very elaborate opinion, showed that the charge of the court below on this subject was erroneous, and that the course pursued by the landlord was in accord with judicial opinion both in England and in this state. In both the foregoing cases, it was held that if the landlord was a trespasser at all, for having kept the goods on the premises for eight days, he would be a trespasser only for the three days' excess beyond five days, and the distress was therefore not invalidated from the beginning. In *Jackson & Gross on Landlord and Tenant*, at § 1104, the authorities are collected, and it is shown that the goods may remain impounded on the premises for a reasonable time after the expiration of the five days, and that in all ordinary cases this will be until the day of sale in due course.

The mere impounding of goods on the premises, until the day of sale, and the landlord's taking them into his exclusive possession under lock and key, is not of itself unlawful and will not necessarily invalidate the distress from its inception. In the present case, the portion of the premises occupied by the plaintiff was a bar-room, where he conducted the business of a retail liquor seller. The rest of the premises he had sublet to another tenant. The property distrained consisted of the bar fixtures, furniture, shelves, and stock of liquor and cigars and other personal property on the premises occupied as a bar-room. Of course it was much more to the interest of the tenant that such property as this should remain in the room than to remove it therefrom; and, as this was the only

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room the tenant occupied, an exclusive possession thereof could not be taken by the landlord except in the way in which it was done. We cannot see therefore that the landlord became a trespasser *ab initio*, by exercising his lawful right to exclusive possession of the distress between the levy and the sale.

But we are not satisfied with the finding of facts by the referee on this subject. Lewis F. List, the constable who made the distraint, testified to the arrangement made with the tenant, by which the latter was to remain on the premises and go on with the business by paying over the receipts of the daily sales, and the efforts the tenant was making to raise money or to sell out to others, all of which proved unsuccessful. This continued from the 10th to the 18th of August. He says: "The receipts were only—one day it was \$5, and the next day \$4, and the next day \$4; there were \$13 in four days' receipts, which he was credited for. Then, after that I was ordered to see him, and to state that it would be better for him to save the watchman's expenses, and to close the place and give me the key, as the result was unsatisfactory, the amount of the receipts from the days' sales. He said, 'If you want the keys you can have the keys and close up,' and showed me the key to the front door and the key to the back door. I finally closed the place up, and took the watchman off, and saved the watchman's expense." The referee makes no mention of this testimony, and gives no reason why it should be rejected. The witness was disinterested, and he was not contradicted. The plaintiff gave a somewhat different version of the conversation, but admitted that he gave up the keys and left the place without objection. It is true, he says, he supposed he had to give them up, because it was the constable, but he does not say that he gave them up under compulsion, nor does he contradict in any substantial respect the version given by the constable. As a matter of course, if the constable's account is correct, his act of taking possession was done with the knowledge and consent of the tenant. The knowledge the tenant admits, and the consent he does not deny. We do not rest the decision of this cause upon this one matter, but, we think, upon the plain import of the undisputed testimony, that there was no such satisfactory proof of an eviction as to warrant the finding that

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there was a clear eviction, by expelling the tenant from the premises, demanding and receiving the keys, and locking the place up. The landlord, in the exercise of his right to impound the distress on the premises, was entitled to demand and receive the keys, and to lock the place up until the sale, and he cannot be convicted of a trespass *ab initio* for doing what the law authorized.

The referee also found that the action of the defendant in visiting the Nonantum Worsted Co. upon the demised premises, and cautioning them not to pay any more rent to the plaintiff, and offering to execute a new lease for that portion of the premises, combined with locking up the bar-room and expelling the tenant, constituted an eviction. It is true he finds that this eviction would suspend the rent for the month of August, which is not a matter of much account, as he also found that the rent due could not be defalked from the damages sustained by the plaintiff. We do not agree that the conversation with the officers of the Nonantum company about a new lease, and the notice to pay no more rent to the plaintiff, would have any effect upon the legality of the distress, and certainly would not convert the landlord into a trespasser *ab initio*.

We think the damages allowed by the referee were quite excessive. At the very time the distress proceedings were going on, two executions were in the hands of the sheriff against the plaintiff, and immediately after the constable's sale the sheriff made sale of the remaining assets, including the plaintiff's interest in the lease, which was bought by the defendants. This was on September 9th, and terminated any interest of the plaintiff in the premises. We cannot tell from the report of the referee what he allowed for loss of business, but as he had found that the value of the property sold was \$900.23, some inference would arise that the difference between that sum and the amount of the award, \$1,650.23, would represent the amount allowed for loss of business. As this period was only from August 18th to September 10th, the finding of such a sum would be altogether out of reason. But it is not a matter of much moment, as we do not consider there was enough in the case to constitute the landlord a trespasser, or to invalidate the distress. As this leaves nothing upon which to found an award

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of damages, it follows that the judgment must be reversed without a procedendo.

Judgment reversed.

136	408
1200	468

JAMES CLARKE ET AL. v. SLATE V. R. CO.

APPEAL BY PLAINTIFFS FROM THE COURT OF COMMON PLEAS
NO. 1 OF PHILADELPHIA COUNTY.

Argued April 3, 1890—Decided October 6, 1890.

[To be reported.]

1. In a suit by a partnership, the names of the partners should be stated on the record as descriptive, and to enable the court to take care of rights growing out of cross-demands, etc.; but the partnership is a distinct person in law, capable of holding property, contracting, suing and being sued, and the cause of action asserted must belong to the firm as such.
2. As a majority of the partners, while acting fairly and in good faith, and keeping within the scope and purposes of the partnership, have power to direct the course of the partnership affairs, they may give a valid warrant of attorney in the name of the firm, authorizing a suit upon a contract made by it, and this notwithstanding the dissent of a minority.
3. Ordinarily, it would be error, after the filing of such a warrant, to make absolute a rule for a sufficient warrant, and to stay the suit; but if it appear that the parties who gave the warrant have been divested of all interest in the firm, and that what was submitted by the parties and decided by the court was the effect of the divesting acts, such order was harmless and will not be disturbed.

Before STERRETT, GREEN, CLARK, MCCOLLUM and MITCHELL, JJ.

No. 167 January Term 1890, Sup. Ct.; court below, No. 52 December Term 1886, C. P. No. 1.

On December 31, 1886, an action of covenant brought in the names of James Clarke, Terrence P. Smart and Francis P. Murray, trading as Clarke, Smart & Co., against the Slate Valley Railroad Company, was instituted by Mr. De Forrest Ballou, as the attorney of the plaintiffs. On February 28, 1887, the defendant obtained a rule on Mr. Ballou to file his warrant of attorney, and on March 2d, Mr. Ballou filed a warrant of attor-

Statement of Facts.

ney, bearing date that day, purporting to be given by James Clarke, Terrence P. Smart and Francis P. Murray, trading, etc., and signed thus :

JAMES CLARKE [Seal]

F. P. MURRAY [Seal]

CLARKE, SMART & CO.

Thereupon, on application of the defendant, the court entered a "rule on counsel for plaintiffs to file a sufficient warrant of attorney; proceedings to stay." Under this rule, many depositions were taken, from which the following facts appeared :

Having formed a partnership, under the name of Clarke, Smart & Co., for the purpose of taking a contract for the construction of the Slate Valley Railroad, Clarke, Smart and Murray, on May 28, 1886, as partners and under the firm name aforesaid, entered into a construction contract with the defendant company, upon which this action was brought. On August 11, 1886, all three partners executed an assignment, transferring to Smart all moneys, stocks, bonds and other evidence of indebtedness, due or thereafter to become due to the firm of Clarke, Smart & Co., under the contract with the railroad company. Appended thereto was an agreement signed by Clarke, Smart and Murray as individuals, bearing date the same day, which recited an account stated between the parties upon which there was found to be due to Smart the sum of \$8,800, the assignment aforesaid, and declared that the true intent and meaning of the assignment was that Smart should apply the moneys, stocks and bonds, to be received by him, to the payment of said sum with interest, and, upon the payment thereof, should re-assign, to the firm of Clarke, Smart & Co., the residue of the property so assigned to him. This suit was afterwards instituted while the assignment of the cause of action to Smart was standing uncanceled, and without his assent. He therefore refused to join in executing the warrant of attorney filed, and the firm name was signed thereto without his authority.

Some time after the date of the assignment, Clarke and Murray gave the railroad company a written notice in regard to it. The testimony on their behalf tended to show that the substance of the notice was that the company must not pay Smart more than \$8,800 in pursuance of the assignment, and Murray testified that he personally informed the secretary of the company that the assignment was obtained fraudulently.

Statement of Facts.

During the pendency of the present rule, to wit, on May 17, 1887, Smart made a settlement with the railroad company of all matters relating to its contract with the partnership, receiving from it in the settlement certain moneys, stock and bonds. On May 20, 1887, Clarke and Murray filed a bill in equity against Smart, praying, *inter alia*, for an account of the partnership dealings, that the assignment above mentioned be declared void as having been obtained by fraudulent misrepresentations, and that Smart be ordered to deliver up the same for cancellation. The bill in equity was referred to a master, who took testimony thereunder, the pending rule in the present case being allowed to stand open in the meantime; and on July 12, 1889, the equity suit was settled by an agreement signed by all the parties which was as follows:

“And now, to wit, July 12, 1889, it is agreed by and between the parties hereto, that the above case shall be discontinued; that the defendant shall pay to De Forrest Ballou, attorney, as costs, counsel fees, and expenses of said litigation, the sum of three thousand four hundred and forty-six dollars.

“That in consideration of the payment of the sum of one dollar to each of us by said defendant, we, the said plaintiffs, release, and forever discharge the said defendant of and from all claims, demands, accounts, reckonings or right to account to us for or by reason of said copartnership, and of and from all claims and demands of every nature and kind whatsoever, heretofore existing between us, to the day of the date hereof.

“That the said defendant, for and in consideration of the sum of one dollar to him in hand paid by the said plaintiffs, hereby releases and forever discharges the said plaintiffs of and from all claims and demands for or by reason of said copartnership, or for or by reason of any other matter, cause or thing, whatsoever, heretofore existing between them to the day of the date hereof.

“That the discontinuance of the above case, and the execution of this instrument, shall not be deemed or taken as a ratification, on the part of the plaintiffs, of the assignment made by the plaintiffs to the defendant, dated the eleventh day of August A. D. 1886, nor on the part of the defendant as an admission of the allegations contained in said bill, touching the validity of the same.

Arguments.

"Witness our hands and seals the day and year aforesaid."

Attached to the foregoing settlement was the receipt of Mr. Ballou from Mr. Smart of "stock and bonds to the value of \$3,446, in full for above."

Testimony for the defendant tended to show that the stock and bonds so receipted for by Mr. Ballou, were part of the same stock and bonds which Smart had received from the railroad company in the settlement made with it by him. There was also testimony for the defendant tending to show that on March 11, 1887, the interests of Clarke and Murray in the partnership of Clarke, Smart & Co., were sold at sheriff's sale to one Bertram Hughes.

The depositions taken having been filed and the rule for a sufficient warrant of attorney being called up for final disposition, the court on December 14, 1889, without opinion filed, made the rule absolute; whereupon the plaintiffs took this appeal, specifying that the court erred:

1. In making absolute the rule for a sufficient warrant of attorney.

Mr. De Forrest Ballou, for the appellants:

1. Any acts done by Smart which would relieve the defendant from the contract on which this suit is brought, are matters of defence which cannot properly be brought before the court in these proceedings. The only thing for determination here is, whether the warrant of attorney is executed by the proper parties and is sufficient. As to any defence to the contract, we are entitled to a day in court and to a jury trial. Each member of a partnership has the authority of a general agent as to everything within the general scope of the firm business: *Kenney v. Altwater*, 77 Pa. 34; *Pahlma v. Taylor*, 75 Ill. 629; *Decker v. Howell*, 42 Cal. 636; *First N. Bank v. Carpenter*, 41 Ia. 518; *Cox v. Hickcan*, 8 H. L. 268; *Campbell v. Dent*, 54 Mo. 325; *Eastman v. Clark*, 53 N. H. 276 (16 Am. Rep. 192); *Davis v. Richardson*, 45 Miss. 499 (7 Am. Rep. 732). Partnerships may sue in their capacity as such: 2 Bell's Com., 510; 5 Waite's Act. and Def., 146. Any partner has authority to use the firm name in bringing suits: *Gay v. Waltman*, 89 Pa. 453.

Arguments.

2. Unless the agreement of August 11, 1886, passed the interests of Clarke and Murray to such an extent as to amount to a dissolution of the partnership, the warrant of attorney filed is sufficient. That agreement was not understood to have, and according to its terms did not have, any such effect. The defendant company made the settlement with Smart, after full knowledge of the rights and duties of the several partners, and actual notice not to deal with Smart under this assignment. It therefore cannot insist upon his acts as binding upon the firm: *Yeager v. Wallace*, 57 Pa. 365; *Batty v. McCundie*, 3 C. & P. 202; *Boardman v. Gore*, 15 Mass. 389; *Cargill v. Corley*, 15 Mo. 425; *Johnston v. Dutton*, 27 Ala. 245; *Dowd v. Sayward*, 12 N. H. 271; *Langan v. Hewett*, 13 S. & M. 122; *Dickinson v. Valpy*, 10 B. & C. 128; *Livingston v. Roosevelt*, 4 Johns. 278; *Clark v. Houghton*, 12 Gray 38; *Feigley v. Sponeberger*, 5 W. & S. 564. Even if this had been an absolute assignment to Smart, it would not have taken from the other partners the right to sue for and apply debts due the partnership to the payment of its creditors. All partners are trustees for creditors to this extent.

Mr. John G. Johnson (with him *Mr. Charles Heebner* and *Mr. George R. Kaercher*), for the appellee:

1. A man has the right to determine for himself whether he shall embark as a plaintiff on a career of litigation, and, if he does so, who shall represent him as his attorney; and the rule of law requiring the filing of a written warrant of attorney is a wise one. It is for the defendant's protection also. He has a right to know by what authority he is sued: *Meyer v. Littell*, 2 Pa. 181. It has even been held that equitable plaintiffs may be compelled to show their authority to use the name of a legal plaintiff: *Mississippi R. Co. v. Railroad Ass'n*, 8 Phila. 107. There is nothing in the partnership relation to make it an exception to the general rule. The law does not regard a firm as a distinct entity, but looks at the individual partners as the real parties: *Gage v. Rollins*, 10 Metc. 354. Partners have no power to appear for or represent each other in suits at law, or to compel each other to appear therein: *Hills v. Ross*, 3 Dall. 331; *Phelps v. Brewer*, 9 Cush. 390; *Hall v. Lanning*, 91 U. S. 166.

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2. But there are special reasons, in this particular case, why the action of the court below should be affirmed. It is the right and duty of the court to protect parties by seeing that its process is not used for purposes of vexation and fraud: *King of Spain v. Oliver*, 2 Wash. C. C. 429. By their assignment to Smart, the plaintiffs, Clarke and Murray, vested the whole equitable right to sue in him, and gave him the right, if he did not have it before, to make a settlement with and give a release to the defendant. After he had made such a settlement, Clarke and Murray settled their equity suit against him, and received from him, with knowledge of their source, part of the stock and bonds which he received from the defendant upon the very contract they seek to sue on. They executed a release to him of all claims growing out of the partnership and that contract, with full knowledge of the fact that he had released the defendant. Their attempted action in this case is fraudulent.

OPINION, MR. JUSTICE WILLIAMS:

The firm in whose name this action is brought consists of three members, viz., Clarke, Smart, and Murray. The plaintiff's claim is on a contract for the construction of the defendant's road. After the service of the summons, the defendant ruled the plaintiffs' attorney to file his warrant. In compliance with this rule, he filed a warrant executed in the firm name and in the individual names of James Clarke and F. P. Murray. This the court decided to be insufficient as an authority for the use of the firm name, and stayed all further proceedings in the action. This ruling is the ground of the appeal, and the only question raised is over the right of De Forrest Ballou, Esq., to prosecute this action in the name of the firm, under the authority of the warrant of attorney which he has filed.

In considering this question, it is important to keep in mind that a partnership is created by the voluntary association of two or more persons for a common object, who severally contribute money or its equivalent to a common stock that is to be owned and used by the partnership for the common benefit. The partnership when formed is a distinct person in law. It has its own name, its own property, and a right to contract, to

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sue and be sued, by its firm name. The names of the persons who compose the firm should be stated on the record as descriptive of it, and to enable the court to take care of the rights of the parties growing out of cross-demands and the like; but the cause of action asserted in the firm name must belong to the firm as such. Joint tenants and tenants in common have several titles to an undivided moiety. Their possession is in common because the share of one has not been separated from that of the others, but the title of each is to the property held in common, and is for a definite part of it. Partners have no title to the partnership property, for the title vests in the firm, and the interest of each member is a resulting interest, the value of which can only be ascertained by an account. Our question then is, not whether the warrant of attorney before us is that of all the individuals who compose the firm of Clarke, Smart & Co., but whether it is that of the firm.

This leads us to consider the manner in which the business of a firm must be conducted. The firm must have its origin in the mutual confidence reposed by the persons who comprise it in each other's skill, integrity, and capacity. Its members are bound by the nature of their compact to the exercise of good faith towards each other and the common enterprise for which they have united. Differences of opinion about questions of administration are to be anticipated. It would be unreasonable to expect that all the members of a partnership should see alike upon all questions, and for that reason a mere difference of opinion about the best thing to do, or the best way of doing it, does not necessarily work a dissolution, or send the business and assets of the firm to a receiver. It was the rule of the common law that the contract of partnership must be governed, like other agreements, by the principles of natural law and justice. It has accordingly been held that, where a firm consists of more than two persons, the majority, acting fairly and in good faith, may direct the conduct of its affairs as long as they keep within the purposes and scope of the partnership: 2 Bouvier's Inst., § 1454; Story on Part., § 123. In such case, the minority must yield, so long as the majority do not transcend or pervert the powers with which the firm has been invested. If the number of partners should in any given case be an even number and they should be

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evenly divided in opinion, with no provision for such a contingency in their articles, then it may be that, as to that subject, the power of the firm to act is suspended so long as the even division continues; and, if the subject be one upon which action is essential to the purposes of the partnership, such disagreement might work a dissolution by rendering the further prosecution of the common enterprise impossible. The same consequences could not flow, however, from the dissent of a minority, because, within the purposes of the partnership and for the promotion of its interests, the majority have the right to control.

Our precise question does not seem to have been decided in this state, but light is thrown upon it by several cases in which the rights and duties of partners have been considered. Thus, in *Marsh's App.*, 69 Pa. 35, it was held that a partner who refuses or neglects to perform the duties incumbent on him, as a member of the firm, may be compelled to make compensation to the firm for the value of the services so withheld. His reasons are not material. His liability springs from his contract obligation, and it would be no defence to allege that the firm had employed some person to whom he objected, or dismissed from its service some one whose retention he desired, or was employing a force which he objected to as too large or too small. The necessity for and the suitability of the persons employed, must be determined, if a difference of opinion exists, by the majority, and when a decision is reached it is binding on the firm. It has been held in many cases of which *Purdy v. Powers*, 6 Pa. 492, and *Anshutz v. Fitzsimmons*, 9 Pa. 180, are samples, that the act of one partner in appropriating partnership property to the payment of his individual debt does not bind the firm. What is still more, the firm may recover the money or the property from the person who thus received it, without regard to the bona fides of his conduct, or the wishes of the partner by whom the misapplication was made. The other members of the firm may consent to what has been done, but, if they do not, they may treat it as the illegal act of the minority which they are at liberty to disregard, and proceed in the name of the firm to recover the money or the goods that belonged to it. This could not be done, however, if the proceedings could be arrested because of the dissent of the partner

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who made the misapplication. If he could arrest the action by saying: "I have not authorized this suit," then the firm and all its members would be absolutely under the power of one unfaithful partner, and the majority would be subjected to the arbitrary will of the minority. But the case is made no stronger, because the dissenting partner has misappropriated partnership property. The successful conduct of the firm business requires the use of the common stock for the common benefit. The direct appropriation of part of it by one of the partners to the payment of his own debts, is no greater violation of his own duty and no greater wrong to his firm, than the indirect appropriation of it by arresting the collection of the sums due from debtors who happened to be his friends. The successful administration of the partnership business requires the collection of the moneys due to it, the enforcement of its contracts, and the protection of its property, as truly as it requires the production and sale of its wares or the construction of the building, road, or other work which is the purpose of its formation.

The case of *Hills v. Ross*, 3 Dall. 331, is not in conflict with the rule we have laid down. It was there held that one partner, who was served, had no authority, by virtue of the partnership relation, to appear for a copartner not served. To do so was to subject him to the jurisdiction of a court into which he did not choose to come, and which had not reached him by the service of its process. The power of one partner to bind his copartners relates to acts properly done in the business of the firm. He may assert or defend the rights of his firm, and, in so doing, he represents it and acts in its stead; but, when he attempts to subject another member of the firm to the jurisdiction of the court by appearing for him, he acts as an individual, and, like any other individual attempting the same thing, he must show his authority, or his act will be held to be unauthorized. In the case now before us, two of the three members of the firm have brought an action in the firm name, upon a contract made by the firm, to collect what is alleged to be due upon it. Such conduct is within the power of the majority, because it is within the scope of the business of the firm, and in furtherance of it. A dissenting minority has no veto power in such a case, but is bound by the action of the majority.

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The investigation in the court below, on the hearing of the rule, took a much wider range than the question raised required, and it would seem that the contest was over the right of the plaintiffs to recover on a full trial. It appeared by the evidence before the court that the firm of Clarke, Smart & Co. had assigned the contract on which the action was brought to T. P. Smart, at the beginning of their operations, and that he had subsequently settled with the Slate Valley Railroad Company for all work done under it, and given a receipt therefor in full. Clarke and Murray allege, on behalf of themselves and the firm, that this assignment was made to secure Smart for certain advances, and that the defendant was duly notified of its character before the settlement was made. By way of rejoinder, it is alleged on the other side that Clarke and Murray, after the settlement between Smart and the railroad company, and with full knowledge of it, settled the partnership affairs with him, received their share of the sum received by him, and released him from all liability to them growing out of the partnership of Clarke, Smart & Co., "or for or by reason of any other matter, cause, or thing whatsoever heretofore existing between them to the day of the date hereof." This date was August, 1889. The suit had been brought in 1886, and the order complained of was made in December, 1889. Upon this state of things, the right of the plaintiff to recover might naturally enough have been denied. In addition to this, the evidence shows a levy and sale by the sheriff of the interest of James Clarke and F. P. Murray in the firm of Clarke, Smart & Co., made in 1887, and the purchase of that interest by a creditor who still holds it. This apparently divested them of all interest in the firm or its property, and left them no ground on which to stand as its representatives. As both the release of 1889 and the sheriff's sale of 1887 were before the court, it seems possible that the action of the court may have been influenced by them; but no opinion was filed or reasons given, and the course of the argument leads us to think that the only question legitimately raised, viz., the power of the majority to conduct the legitimate business of the firm in the firm name, and for that purpose to employ an attorney, was that on which the decision turned. If this be so the court was in error. If, on the other hand, the parties submitted and the court passed

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upon the effect of the sheriff's sale, and made the rule absolute for the reason that Hughes, the purchaser, now stood in the position that Clarke and Murray occupied when the suit was brought, we see no reason for disturbing the conclusion so arrived at. As no injustice was done by the order, as the case now appears in this court, and as there is reason to think that the question submitted and passed upon was that of the plaintiff's right to recover on the facts before the court, we are disposed to let the order stand, and it is accordingly

Affirmed.

HUGH McVEY v. JOHN DURKIN.

APPEAL BY DEFENDANT FROM THE COURT OF COMMON PLEAS
NO. 2 OF PHILADELPHIA COUNTY.

Argued April 3, 1890—Decided October 6, 1890.

1. A wall between two buildings of adjoining owners, used as a common wall continuously for a period of more than twenty-one years, becomes a party wall to the properties, whether equally upon the lot of each, or wholly upon the lot of one owner.
2. Where such a wall, condemned by the Philadelphia building inspectors, under the act of May 20, 1857, P. L. 590, has been removed, and another erected in its place and approved by the inspectors, the owner removing and rebuilding is not liable in trespass therefor.

Before STERRETT, GREEN, CLARK, WILLIAMS and MITCHELL, JJ.

No. 182 January Term 1890, Sup. Ct.; court below, No. 693 June Term 1888, C. P. No. 2.

On August 4, 1888, Hugh McVey brought trespass against John Durkin, to recover damages for unlawfully tearing down a wall of defendant's house. Issue.

At the trial on October 30, 1889, the defence was made that the wall torn down by the defendant was a party wall, which had been condemned by the building inspectors, under the act of May 20, 1857, P. L. 590. The facts sufficiently appear in the opinion of the Supreme Court.

136	418
218	183

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The plaintiff claiming that the wall in controversy was wholly upon his lot and was not a party wall, called Henry H. Stallman, who testified that he was a surveyor and civil engineer by profession; that, as surveyor of the district, he had made a survey and plan of the plaintiff's lot, according to the United States standard, showing that his northeast wall, the wall in dispute, was wholly on plaintiff's lot, and that the portion at the rear which had been torn down and rebuilt by the defendant was $4\frac{1}{2}$ inches within plaintiff's line. The plaintiff offered the plan in evidence. Objected to. Objection overruled and plan admitted; exception.¹

At the close of the testimony, the court, PENNYPACKER, J., charged the jury:

The claim of the plaintiff here is for injuries caused by the alleged illegal entering upon his premises by the defendant, and injuring his property. The injuries which are alleged to have been done are, as I understand it, threefold. It is claimed, in the first place, that upon these buildings, which are stone in front and frame in the rear, the defendant broke into the stone wall for the sake of inserting his joists in the erection of a new building; and that, as to the rear, which was frame, he took down the partition wall; and, thirdly, that in the course of this work, if it was legally done, the work was not done in a workmanlike way, and that there were injuries to the plaintiff's premises which were unnecessary.

The first question, probably, which you will be called upon to determine, is as to whether or not this wall was a party wall. There has been a good deal of testimony and considerable discussion in this case about the standard of measurement, but it seems to me that that matter will not affect you seriously in coming to a conclusion. It appears that a good many years ago these lots were laid out by a man named King, and that the standard of measurement which he used was the United States standard. Now, it appears that the predecessors in title to both of these lots got their lots according to that measurement; and a change in the standard since, of course, could not in any way affect the location of the lots. It would be an absurd thing to say that because a standard had since been adopted which shortened the distance a foot,—and the testi-

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mony is that the difference between the city standard and the United States standard is three eighths of an inch in thirty feet,—that therefore the lots and ownership of the ground in this city are to be affected.

In addition to that, it appears in this case, and apparently without dispute, or at least with very little dispute, that these properties were in substantially the same condition, when this work was commenced, as they had been since 1848. Both of these houses were erected, at that time, and, even if there had been a difference as to the measurements, then, the fact of these properties having been owned and occupied adversely for that length of time would give a title to them in their present shape and condition under the statute of limitations.

I shall confine myself, in the first instance, to the question whether this front wall, or stone wall, between the two properties in front, was a party wall. Upon that subject, Mr. Lightfoot says that the northeast face of the wall, that is, the wall of the property belonging to the plaintiff, was on Goodman's property. Goodman was the grantor of the plaintiff. Stallman says that the wall of McVey's house is on his northeast line; and Mr. McVey himself testified that according to the report which was made to him by the lady from whom he bought, his wall was eight inches over on his property; and he further testified that there were no joists from the other side in this wall. [So that, if you believe that testimony, the wall was not used as a party wall. If you should find that this wall was all on Mr. McVey's property, and that it had not been used by the other side for the insertion of joists or otherwise, then it was not a party wall.] *

On the other hand, however, Mr. Steel, who is a gentleman employed in the surveyor's department in that district, testified that if the measurement was according to the United States standard, which, as I have said to you, was the standard at the time these lots were laid out, the end on Centre street would be right, but that it would cut off about four and a half inches in the rear from McVey's house; in other words, that, as you run back, a part of McVey's house is upon the line and across the line. Now, if these houses were built with the wall partly on the line of the adjoining property and extending beyond it, the presumption would be that it was for the purpose of mu

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tual support, and it would be a fact from which you might infer that it was intended that this wall should be a party wall.

Then Mr. Durkin tells you, and he says it very positively, that the joists in his second story rested on that partition wall, the northeast wall of McVey's house. If you should find that to be the case, it would be the strongest evidence that this was a party wall; and, if it was a party wall, used in this way for these purposes and, especially, for the number of years that elapsed in this case, Mr. Durkin would have a right still to use it, and it would not be trespass for him to insert his joists into it in building his new structure.

The next question is as to the taking down of the partition between the frame structures; and upon this subject I will read to you what the law says in regard to the taking down of an old wall and the erection of a new one:

"It shall be the duty of the inspectors of buildings, upon the application of any person or persons about to erect on his or their lot or lots of ground a new building, to examine all such party or division walls upon or adjoining said lot of ground, and if deemed and adjudged by them to be insufficient and unfit for the purpose, such party or division wall shall be removed and taken down by the last builder:" Act of May 20, 1857, P. L. 590.

It is alleged upon the part of the defendant that he took down this wall in consequence of the fact that this partition had been condemned by the building inspectors, and under an order from them to do so. [As you see, that act gives the right to the building inspectors, in the case of a party or division wall, so that the same question arises whether as a matter of fact this partition was a party wall between the parties, because their jurisdiction extends only to party or division walls.] *

Upon this subject, and it seems to be the most important part of the case, the evidence, as sometimes happens about material portions, is not very clear, and not very decided. . . . These are the facts from which you will have to determine, and if there are other facts, you will consider them, of course, as to whether or not this was a party or a division wall. If it was a party or a division wall and the building inspectors ordered it to be taken down, and there was no appeal taken by

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the plaintiff here, the finding of the building inspectors in that respect is conclusive and final.

It is only conclusive, however, as to the direction to take down a party wall. It cannot be made to answer for other purposes. It was not part of their jurisdiction to determine the lines between these parties. That would come up before another body. It is true the surveyor of the district was here, and he told you that he had laid out the line for Durkin. That, however, would not conclude McVey, for the reason that to make it conclusive upon McVey there should have been previous notice given him. The law has wisely directed that these questions of boundaries shall be determined by a body competent to do so, which is the bureau of surveys. But the rights of the parties are protected, and there is a right of appeal from their decision; and in order that the parties may be protected, it is necessary, in order that they may be held, that there should be previous notice given. . . .

It does appear in this case, from the evidence of the defendant, that when this wall was taken down, or this frame partition, that the line was straightened; that is, Mr. Steel tells you that he ran a straight line, and that these people substantially conformed to it. He also tells you that the line before was not straight; that there was an angle in it and it ran crooked. So that it appears that at this time there was a change from the line; and I instruct you that to that extent the order of the building inspectors would be no justification.

If you go beyond this, and you find that there has been a trespass in this case, the next question is as to what should be the damage, ...

I have some points upon which I have been requested to charge. In the first place, I shall answer the plaintiff's points:

5. If the jury find that the defendant unlawfully went upon the premises of the plaintiff and wantonly and maliciously injured the plaintiff's house and property, the jury may, in addition to damages by way of compensation, award the plaintiff such damages as will punish the defendant for such wanton, malicious and unlawful act.

Answer: We affirm this point, but I leave it to you to consider whether the evidence in this case warrants any inference that what was done was done wantonly and maliciously. It

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seems there was a question, arising out of the different standards of measurement, as to where these lines were. The defendant seems to have gone to the plaintiff to endeavor to settle it outside of court, and to have had the instructions of the building inspectors and the board of surveys; and I leave it to you to consider whether under this evidence you can find that there is anything wanton or malicious in the action which he has taken, even if you should find the facts in this way.⁴

I will now answer the defendant's points.

1. That if the jury find from the evidence that the house of the defendant was built more than twenty-one years prior to June, 1888, the date of the alleged trespass, then the plaintiff is not entitled to recover for the use by defendant of the stone division wall between the house of the plaintiff and defendant.

Answer: This is declined.⁶

2. That if the jury find from the evidence that the wooden partition between defendant's and plaintiff's back buildings was condemned by the building inspectors and ordered to be taken down, then the defendant is not guilty of trespass in removing said partition.

Answer: This point is affirmed, if you find it was a division or party wall.⁷

The jury returned a verdict for the plaintiff for \$650. A rule for a new trial having been discharged, judgment was entered on the verdict, when the defendant took this appeal assigning for error:

1. The admission of plaintiff's offer.¹

2, 3. The parts of the charge embraced in []^{2 3}

4. The answer to plaintiff's point.⁴

6, 7. The answers to defendant's points.^{6 7}

Mr. Joseph Savidge and Mr. F. Carroll Brewster, (with them Mr. Edmund B. Seymour), for the appellant.

Counsel cited: *Doyle v. Ritter*, 6 Phila. 577; *Western N. Bank's App.*, 102 Pa. 171; *Oat v. Middleton*, 2 M. 248; *Ingles v. Bringham*, 1 Dall. 367; *Hart v. Kucher*, 5 S. & R. 1; *Todd v. Stokes*, 10 Pa. 155; *Dauids v. Harris*, 9 Pa. 501; *Vollmer's App.*, 61 Pa. 121; *Dannaker v. Riley*, 14 Pa. 435; *Bell v. Bronson*, 17 Pa. 363; *Barns v. Wilson*, 116 Pa. 303; act of May 20, 1857, P. L. 590; *Lyster v. Bitner*, 7 Phila. 349.

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Mr. Sheldon Potter and Mr. Leoni Melick, for the appellee.

OPINION, MR. JUSTICE STERRETT:

It appears that, in 1847, Robert H. Thomas, owner of lot fronting sixty feet on Centre street, erected thereon two adjoining houses, numbered 255 and 257. In May, 1848, he conveyed the house and lot No. 255, thirty feet front on Centre street by one hundred and fifteen feet in depth, to William Selzer, and in June, 1848, he conveyed the other house and lot, No. 257, also thirty feet front by one hundred and fifteen feet in depth, to Sarah Strouse. By sundry mesne conveyances, title to the former became vested in the plaintiff, and, by like assurances, the title to the latter became vested in the defendant. Both houses were stone front, with wall of same material between them, and back building divided by a frame partition. In July, 1888, the defendant, being about to improve his lot by erecting thereon two brick buildings, in lieu of the old stone and frame building, was notified by the building inspectors that they had condemned the wooden partition or division between the old back buildings as insufficient for the building defendant was about to erect, and ordered the same to be taken down. Pursuant to that notice, he removed the frame partition or division wall and erected in place thereof a nine-inch brick wall, which was afterwards approved by the building inspectors. He also utilized the old stone partition or division wall as a party wall. The trespass complained of is alleged to consist in using the old stone wall, taking down the wooden partition, and the careless manner in which the latter work was prosecuted.

It appears to be an undisputed fact that from the time the lots passed to different owners, in 1848, down to 1888, when the defendant commenced to rebuild, the respective owners and their tenants occupied their lots and houses, separated from each other only by the stone wall and wooden partition aforesaid. In view of that long-continued occupancy and possession by the owners of the respective lots, it matters little whether the stone wall and wooden partition separating the two houses were exactly on the dividing line between the two lots or not. The uncontroverted evidence is that the owners of the houses and lots were each in the exclusive possession of their respective lots and houses long enough to give each, as against the

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other, an undisputed title by possession, and thus constitute the stone wall and wooden partition a party wall. In *Western N. Bank's App.*, 102 Pa. 171, it was held that a partition or wall erected and continuously used by adjoining owners for a period of twenty-one years, whether the same be erected equally on the lot of each party, or is wholly within the lot of one of the adjoining owners, is in the eyes of the law a party partition, or wall, and if condemned by the building inspectors, and removed, and another erected in its place, the party so removing the old and erecting the new wall is not guilty of trespass.

In his first point for charge, the defendant requested the court to say: "If the jury find from the evidence that the house of defendant was built more than twenty-one years prior to June, 1888, the date of the alleged trespass, then the plaintiff is not entitled to recover for the use by defendant of the stone division wall between the plaintiff and defendant." This point was refused, and in that we think there was error. The main fact of which the point was predicated was not seriously disputed, and the jury could not have found otherwise than that defendant's house was built more than twenty-one years prior to the commission of the alleged trespass. The error was fundamental, and may have had a controlling effect in shaping the verdict.

The affirmance of defendant's second point was so qualified as to depend on the finding of the jury that the wooden partition between plaintiff's and defendant's back buildings was in fact a division or party wall. As we have already seen, the undisputed evidence is that the partition in question was used for more than twenty-one years, prior to the commission of the alleged trespass, as a partition or division wall between the two back buildings, and hence it should have been treated as a party wall. The point should have been affirmed without the qualification complained of in the sixth specification.

There was no error in admitting in evidence the plan referred to in the first specification. It was identified by the witness, and referred to in his testimony, and was properly admitted in connection therewith. Nor was there any error in the answer of the court to plaintiff's fifth point recited in the fourth specification. The somewhat guarded affirmance of the

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point was warranted by the evidence. The remaining specifications are not sustained.

Judgment reversed, and a venire facias de novo awarded.

JESSE RAPP ET AL. v. NATIONAL SEC. BANK.

APPEAL BY PLAINTIFFS FROM THE COURT OF COMMON PLEAS
NO 4. OF PHILADELPHIA COUNTY.

Argued April 8, 1890—Decided October 6, 1890.

[To be reported.]

1. When the amount of a check, left with a bank for collection, is credited to a depositor as cash, it may be charged back to him in case it turns out to be worthless, unless the bank has been negligent, or has done something to mislead the depositor into acting, to his injury, on the faith of its goodness: the depositor has no right to be misled by the mere credit of the check as cash.
- (a) On August 12th, a stranger called on the plaintiffs in Philadelphia, purchased goods to the amount of \$146, and offered in payment a certified check on the Merchants' Bank of New York for \$900. Before accepting it, the plaintiffs submitted the check to the cashier of the defendant bank, who advised them not to take it, for fear it might be "raised."
- (b) There was nothing on its face to indicate any alteration, and the cashier's advice was based simply on the nature of the proposed transaction with the stranger. The cashier further said that the only thing he could do for the plaintiffs would be to send the check on for collection and see whether it would be paid, and, if it was paid and kept, it might be supposed all right.
- (c) After seeing the stranger and getting his assent, the plaintiffs deposited the check to their account with the defendant bank; but, as they did not have their pass-book, it was not credited therein on that day. On August 14th, the pass-book was brought to the bank, the deposit entered in it, and on the same day the plaintiffs paid to the stranger the difference between \$900 and \$146.
- (d) The defendant bank sent the check on August 12th to its New York correspondent, and it was paid in due course by the Merchants' Bank. A month later, in balancing the book of the drawer, the Merchants' Bank learned that the check had been altered, before certification, from \$7 75 to \$900. Thereupon the defendant's correspondent returned the \$900 to the Merchants' Bank, and charged the same against the defendant:

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2. The defendant, having allowed this charge, had the right to charge the check against the plaintiffs' deposit account, each person or bank who had received the money, or a credit, upon the check, being bound to restore it when the fraud was discovered: *Clews v. Bank*, 89 N. Y. 418; *Espy v. Bank*, 18 Wall. 619; *Bank v. Bank*, 55 N. Y. 215, and *Natl. Park Bank v. Bank*, 114 N. Y. 33, distinguished.

Before PAXSON, C. J., STERRETT, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 207 January Term 1890, Sup. Ct.; court below, No. 741 December Term 1885, C. P. No. 4.

On December 22, 1885, Jesse Rapp, Jesse V. H. Rapp and Reuben B. Rapp, trading as Jesse Rapp & Sons, brought assumpsit against the National Security Bank of Philadelphia, to recover a balance alleged to be due to the plaintiffs, as depositors in the defendant bank. The pleas were non-assumpsit, set-off, and payment with leave. Jesse Rapp, Sr., one of the plaintiffs died before trial.

The case was first tried on May 15, 1889, when a verdict was rendered in favor of the plaintiffs for \$920, but a rule for a new trial was afterwards made absolute.

At the second trial on October 8, 1889, the following facts were shown:

In August, 1885, the plaintiff firm did business as furniture dealers, and kept a bank account with the defendant. On August 12th a stranger called at the plaintiff's place of business, introduced himself as L. H. Martin, purchased furniture to the amount of \$146, and offered in payment for it a certified check for \$900 upon the Merchants' National Bank of New York, to the order of L. H. Martin, dated August 3, 1885, and drawn by Woodrow & Lewis. On being told that as he was a stranger the check could not be taken, he suggested that the plaintiffs find out, by telegraphing to the bank, whether it was good or not. Jesse Rapp, Sr., who was the father of the other members of the firm then took the check to the defendant bank, and consulted its cashier, George W. Cox, in regard to it. What took place at the interview with Mr. Cox was thus narrated by the latter, testifying for the defendant:

"On the 12th of August, 1885, Mr. Jesse Rapp, the father, came back into my room at the bank with this check in his

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possession, and said, 'I have a check on New York that I would like to know something about.' I said, 'Well, what can I do for you?' He handed me the check. It was then in a very clean condition; much more so than it is now. I said, 'Mr. Rapp, I do not know anything about this check.' He then called my attention to the fact of its being certified. I said, 'That does not amount to anything. I have seen checks that have been altered, the signatures forged, and certificate forged; also the stamp of the depositors forged, put on the back; I have seen that.' I said, 'What is the trouble, Mr. Rapp?' 'Well,' he said, 'I have sold a bill of goods to parties, and they want the difference in cash between the bill and this check.' I said, 'How much is the bill; about what have you sold them?' He hesitated a little while, and said, 'About \$150.' Then I said, 'Mr. Rapp, if I were you, from the experience I have had in these matters, I would not touch this check. These men who are going about with raised checks are doing this very thing,—passing altered checks on innocent people, buying a small lot of goods and getting a large amount of money in exchange.' I said to him, 'I do not know that the check is good or not, or that it is properly certified; but if I were in your case I would not take the check or have anything to do with them, unless you know the parties with whom you are dealing.' He said to me, 'I don't know them; they are strangers. They are there to buy the goods, and I would like to sell the goods.' 'Well,' he said, 'what can you do, Mr. Cox?' I said, 'The only thing that I can do in the matter that I know of, if you just leave this check for collection, I will send it to New York to-day with the rest of the checks. If the check is kept, not forged, and not returned, then we will suppose that it is all right. That is all that we can do. If you want to leave this check for collection, take it out to the discount and collection clerk and give it to him.'"

Mr. Rapp then returned to the store and told Martin that he would not be able to find out about the check until August 14th. Martin told him to leave the check with the bank, and he, Martin, would return on the 14th. Mr. Rapp then returned to the defendant's banking house with the check and gave it to Charles H. Wischman, the receiving teller. Wischman testified for the defendant that he had not heard the prior conversation

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between Mr. Rapp and the cashier, and did not know what it was about; that Rapp merely presented the check for deposit, and the witness received it as a deposit on account of the firm; that as Rapp did not have the firm's pass-book along with him, the deposit was not credited therein that day, but on August 14th, the pass-book being presented, the witness took the scratcher, found the entry of credit for deposit in that, and entered it in the pass-book; that the custom at the bank, when a depositor came without his pass-book, was to make out a ticket for the deposit, and as soon as he would bring his book and ask to have it entered there, to make such entry; that from this custom, the witness would say that the credit was entered in the pass-book the next time that it was brought to the bank, and without any inquiry as to whether the check had been paid or not, and that the witness would have so entered it on the 12th, if the book had been there.

About three o'clock on the 12th, this and other checks on New York banks were handed to the defendant's cashier, to be forwarded for collection. The cashier sent them by mail to the New York correspondent, the First National Bank, and he subsequently received from the First National Bank an acknowledgment of their receipt, and of a credit for their amount in favor of the defendant bank. The First National Bank, on the morning of August 13th, sent the check of Woodrow & Lewis for collection through the clearing house, and it was paid by the Merchants' National Bank crediting the First National Bank with its amount in the settlement of their balances at the clearing house that day.

On August 14th, Martin returned to the plaintiffs' store and Jesse Rapp paid him \$754, the difference between the price of the goods purchased by him and the amount of the check. Whether this payment was made before or after the entry of the credit in the plaintiffs' pass-book, did not appear.

The check remained with the Merchants' National Bank until September 11, 1885, when the deposit account of Woodrow & Lewis with said bank was balanced, and it was thereupon discovered that the check had been "raised." It was originally dated July 28, 1885, and drawn for the sum of \$7.75, to the order of Louis Prentice. Between that date and August 4th, it was altered by some one as to its date, amount and

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the name of the payee, and on August 4, 1885, when it was presented to the Merchants' National Bank for certification, it was in the same condition as when Rapp & Sons afterward received it. The alterations were so skilfully made that they could not be detected by examination, and there was nothing upon the face of the check to excite any suspicion that it had been tampered with. Accordingly, the paying teller of the Merchants' Bank certified it as requested, and when it was afterward presented through the clearing house it was paid without question.

Upon the discovery of the forgery, the Merchants' Bank credited Woodrow & Lewis again with the amount of the check, returned it to the First National Bank, and asked for and received a corresponding credit from the latter. The First National Bank then charged it up against the defendant and gave notice thereof by telegraph. The telegram was received after bank hours, on September 12th, and the defendant's cashier at once sent it by W. H. McKee, the forwarding clerk, to the place of business of the plaintiffs. Being informed by one of the plaintiffs that they had shipped the goods purchased from them by Martin only a few days previously, McKee offered his services in endeavoring to get delivery of the goods stopped, with the aid of a friend in the employ of the Philadelphia & Reading Railroad Company. He succeeded in effecting this, and the goods were recovered by the plaintiffs.

On September 14th, the defendant received from the First National Bank of New York a letter giving fuller information in regard to the forgery and returning the forged check, whereupon the defendant charged up its amount against the plaintiffs' account. The same day Jesse V. H. Rapp and Reuben B. Rapp, neither of whom had previously made any inquiry respecting the check of any of the bank officials, went to the bank and saw the cashier, Cox. Jesse V. H. Rapp testified for the plaintiffs that on that occasion he said to the cashier, "Mr. Cox, how are we to do in regard to these matters? Didn't we come to you as a child comes to a parent, asking for information? Why didn't you let my father telegraph to the maker of that check, as he wished to, instead of telling him to let you take it and you would find out for him;" to which Cox replied: "Mr. Rapp, understand we don't accuse you of doing

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anything wrong or neglecting anything, but," he says, "it is one of those peculiar cases where the law upholds us;" whereupon the witness said: "If that is the case, we will have to see further." Cox, testifying for the defendant, denied that such conversation took place, and denied that Jesse Rapp, Sr., ever asked the witness to telegraph in regard to the check.

At the close of the testimony, the court instructed the jury to find a verdict for the defendant,¹ refusing the following points presented by the plaintiffs:

1. If the jury believe that the plaintiffs, being in doubt as to the propriety of accepting the \$900 check, went to the defendant for information and advice; that they communicated to the defendant the fact that the check had been presented to them by a stranger, who wished to obtain a bill of goods and cash for the same, and that they were unwilling to do this until they knew it was safe to do so; that the question of whether or not the check may not have been raised was discussed between plaintiffs and defendant's cashier; that the check, after all this, was left with the defendant on deposit, to be credited, if found to be correct and if paid; that plaintiffs declined to deliver the goods, or to pay money to the presenter of the check, until they had ascertained from the defendant that the check was all right; that, after this check was sent by the defendant to its correspondent in New York for collection, without its making any inquiry concerning the genuineness and correctness of the check, and without communicating any of the above facts, that the check was then paid by the bank upon which it was drawn to the defendant's correspondent; that the latter then credited the defendant with the amount; that this amount was then credited by the defendant to the plaintiffs, who were apprised of the fact of such credit to them; that upon the faith of, and in reliance upon, this credit, the plaintiffs thereafter paid to the presenter of the check the sum of \$754; and that no notice was given to the defendant or to the plaintiffs, for a month after payment in New York of the check, of the fact that it had been raised. If all these facts are found by the jury, then the plaintiffs are entitled to recover from defendant the sum of \$754, with interest from the time it refused to honor plaintiffs' check therefor.²

Arguments.

2. If the jury find that the plaintiffs, being in doubt as to the propriety of accepting the \$900 check, went to the defendant for information and advice; that they communicated to the defendant the fact that the check had been presented to them by a stranger, who wished to obtain a bill of goods and cash for the same, and that they were unwilling to do this until they knew that it was safe to do so; that the question of whether or not the check may not have been raised was discussed between plaintiffs and defendant's cashier, then I instruct you that it was the duty of the defendant, in sending the check to New York for collection, to do more than merely to inclose it to its correspondent. It was its duty to make mention of the facts which had been communicated to it, and to cause some inquiry to be made as to the genuineness of the check. A neglect of its duty, if it resulted in loss to the plaintiffs by their reliance upon the fact that the check had been paid, and by their payment of \$754 upon the faith thereof, subjects the defendant to the duty of paying any money credited to the plaintiffs for the check and subsequently paid out by the latter on the faith of the credit.²

The jury, as directed, found for the defendant, and judgment was entered on the verdict; whereupon the plaintiffs took this appeal, assigning for error:

1. The instruction to find for the defendant.¹
- 2, 3. The refusal of the plaintiffs' points.^{2 3}

Mr. John G. Johnson, for the appellants:

In the ordinary case of the deposit, without warning, of a raised or forged check, the amount of which has already been paid out by the depositor, he, and not the bank, must bear the loss. But in the present case, the plaintiffs consulted the bank before receiving the check; apprised it of all the circumstances; deposited it with the bank, as their agent, to see that it was all right, and only paid out the money to Martin after having been credited with its amount upon their bank-book, and receiving what amounted to a practical assurance that nothing was wrong. The cashier knew that the plaintiffs were only agents of Martin for collection as to \$754 of the amount of the check, and that, as soon as it should be credited as hav-

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ing been collected, they would pay over that much of the collection to him. We maintain :

1. Under the circumstances of this case, the bank was negligent, and therefore the loss must fall upon it. With the information that the cashier had, it became his duty to notify the New York correspondent to make such inquiry of the drawer, or such statements to the bank upon which the check was drawn, as would develop the truth respecting whether the check was raised or forged. Had this duty been performed, there would have been no loss. It is the duty of any bank, in circumstances such as are admitted by the cashier in this case, to take ordinary precautions to guard those for whom it acts as agent in collecting a check, against loss: *Clews v. Bank*, 89 N. Y. 418 (42 Am. Rep. 308); s. c. 105 N. Y. 403; *Espy v. Bank*, 18 Wall. 619.

2. The loss to the plaintiffs occurred after they had been credited by the bank with the amount of the check, and in consequence of their paying the money to Martin in reliance upon that credit; therefore, the loss must fall on the bank. As we have said, to the extent of the cash paid to Martin, the plaintiffs acted merely as his agents in depositing the check for collection, and the bank knew this. It is well settled that a party paying money to an agent cannot recover it back from the agent, as paid by mistake, after he has paid it over to his principal. Again, when a mistake has occurred by which one of two innocent parties must suffer, the loss must be borne by the one who first suffered it, in this case the bank. The principle we contend for is established by *Nat. Bank of Commerce v. Bank*, 55 N. Y. 215, which should be binding, as the transaction here was in New York.

3. The First National Bank of New York and the defendant bank acted as volunteers in reimbursing the Merchants' Bank, and had no right of reimbursement themselves. The Merchants' Bank paid the money to a mere agent which charged itself with the amount in favor of the defendant bank, and the latter credited the amount to the plaintiffs. There was, therefore, no right in the Merchants' Bank to demand payment from either of the other banks. If it had any right of action, it was against the plaintiffs, who as principals had received the

Arguments.

money. The banks, which as mere collecting agents, had received and paid over the money, could not have been compelled to refund it, and a volunteer, who pays money he is not obliged to pay, cannot recover it: *National Park Bank v. Bank*, 114 N. Y. 88.

Mr. Edward H. Weil, for the appellee:

1. The authorities are uniform that if the suit had been against the Merchants' Bank upon the certified check, it would not have been responsible, and that, on paying the check, it had a right of action against the parties who received the money, on the ground that it was paid by mistake and without consideration. By certifying to the check, the bank simply certified to the genuineness of the drawer's signature, and to the fact that he had sufficient funds on deposit to meet it, engaging that those funds should not be withdrawn by him; but it did not warrant the genuineness of the body of the check, either as to payee or amount: *Marine N. Bank v. Bank*, 59 N. Y. 67 (17 Am. Rep. 305); *Security Bank v. Bank*, 67 Pa. 458; *Clews v. Bank*, 89 N. Y. 418 (42 Am. Rep. 303); s. c. 105 N. Y. 403; *Espy v. Bank*, 18 Wall. 604; *Parke v. Roser*, 67 Ind. 500 (33 Am. Rep. 102); *Third N. Bank v. Allen*, 59 Mo. 310; *Redington v. Woods*, 45 Cal. 406 (13 Am. Rep. 190); 2 *Daniel on Neg. Inst.*, § 1661.

2. The rule laid down in this state, in *Levy v. Bank of U. S.*, 1 Binn. 27, that the acceptor of a forged bill must pay it, was altered by § 10, act of April 5, 1849, P. L. 426; *Tradesmen's Bank v. Bank*, 66 Pa. 435; *Union N. Bank v. Chambers*, 9 Phila. 129; *Corn Exchange N. Bank v. Bank*, 78 Pa. 233. The point that the other banks acted as volunteers in reimbursing the Merchants' Bank, is so novel that it was not made in the court below. The New York decision cited by the appellants as supporting it, will be found on examination to rule the question directly the other way. Even if the facts were as assumed in the plaintiffs' points, there is not the slightest evidence of any negligence on the part of the defendant. It is obvious that, if the plaintiffs can recover in this case, a large mass of the business of the whole commercial world must come to a standstill.

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OPINION, MR. CHIEF JUSTICE PAXSON:

This was a suit against the defendant bank to recover an alleged balance of \$900. There was no dispute that they would have been entitled to this balance but for the reason that a raised check, which they had deposited for collection, and for which they had received credit, had been charged back to them. The facts in regard to this check are substantially as follows:

The plaintiffs are dealers in furniture. On the 12th of August, 1885, a stranger, introducing himself as L. H. Martin, called at their place of business to buy furniture. He selected goods to the amount of \$146, and offered in payment a check on a New York bank for \$900, and requested to be paid the difference, \$754, in cash. The check was marked "Good," and there was nothing upon its face to show any irregularity. Before accepting it, Jesse Rapp, Sr., a member of the firm, called at defendant bank, in which they kept an account, and submitted the check to Mr. Cox, the cashier. Mr. Cox said to him: "'Mr. Rapp, if I were you, from the experience I have had in these matters, I would not touch this check. These men who are going about with raised checks are doing this very thing,—passing altered checks on innocent people, buying a small lot of goods, and getting a large amount of money in exchange.' I said to him, 'I do not know that the check is good or not, or that it is properly certified; but if I were in your case I would not take the check or have anything to do with them, unless you know the parties with whom you are dealing.' He said to me, 'I don't know them. They are strangers. They are there to buy the goods, and I would like to sell the goods.' 'Well,' he said, 'what can you do, Mr. Cox?' I said: 'The only thing that I can do in the matter that I know of, if you just leave this check for collection, I will send it to New York to-day with the rest of the checks. If the check is kept, not forged, and not returned, then we will suppose that it is all right. That is all we can do. If you want to leave this check for collection, take it out to the discount and collection clerk, and give it to him.'"

This is the material part of Mr. Cox's testimony. I have given it somewhat at length, as it is the only evidence of what took place at this interview. Mr. Rapp was deceased at the

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time of the trial, and we need not speculate as to what he would have testified to if living. In the absence of any conflict of testimony, we must assume the facts to be as detailed by Mr. Cox. His advice to Mr. Rapp was just what any prudent cashier, fit for his position, would have given.

This interview occurred on August 12, 1885. Before Mr. Rapp left the bank, he deposited the check in question for collection. He did not have his bank-book with him, and of course the check could not be entered therein. It came to the bank on the 14th, when the check was entered as cash. The bank forwarded it to the First National Bank of New York for collection, which bank received it, and credited the defendant bank with the amount. Nothing more was heard of it until September 12th, when the New York bank notified the defendant bank by wire and letter that the check in question had been altered from \$7.75 to \$900. The First National Bank of New York refunded the money to the Merchants' National Bank, which had paid it, and charged the same to the defendant bank. The latter, on September 14th, charged the check to Rapp & Sons, who had deposited it, and at the same time notified them thereof.

On the 14th of August, the second day after they had deposited the check, Rapp & Sons closed the transaction with Martin, and paid him the difference between the check and the bill. They did not wait to hear from the check, nor do they appear to have called at the bank at any time to inquire about it, until they received the notice of its dishonor. Reuben P. Rapp, one of the plaintiffs, testified: "I never made any inquiry at the bank until after that day they notified us that the check was bad, and then brother and I went down."

The plaintiffs claim to recover against the bank for three reasons, viz.:

1. The bank was negligent.
2. The loss to plaintiffs occurred after they had been credited with the amount of the check.
3. The defendant bank was a volunteer in reimbursing the New York bank.

These propositions can be readily disposed of. The defendant bank assumed no duty, and was chargeable with no duty, except that of forwarding the check for collection in the usual

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manner. There was nothing upon the face of the check to indicate that it had been forged or raised. The mere possibility of such a thing was suggested by the cashier, not from any indications upon its face, but from the proposed transaction between Martin and Rapp & Sons. The latter were warned that it was the practice of those who altered checks to buy a small bill, and get a large amount of money in return. The signature to the check being admittedly genuine, and the raising of it so skilfully done as to avoid detection, it was promptly paid when presented to the Merchants' National Bank, upon which it was drawn. In such case the fraud would only be detected when the bank came to settle the account of the depositor who drew the check. This might involve a delay of weeks. When the check was called to the attention of Edward L. Lewis, who drew it, the forgery was at once detected, and the check was promptly started on its way back to Rapp & Sons, by the same channel it had been forwarded. We see no evidence of delay or negligence in this branch of the case, and it needs no argument to show that each bank or person who received the money or a credit for this check was bound to restore it when the fraud was discovered. This is the general rule, and we need not discuss it at length, as the court below was not asked for instructions as to the effect of the payment of the check by the Merchants' National Bank, and its right to reimbursement therefor.

The proposition that the loss to the plaintiffs occurred after they had been credited with the check, and by reason thereof, cannot be sustained. Checks deposited for collection in city banks are entered as cash unless there is some reason to distrust the depositor. There was no such reason in this case, and the evidence shows that the check would have been entered as cash on August 12th, when it was deposited, but for the reason that Mr. Rapp had not his bank-book with him. It was so entered on the 14th of August, when the book came to the bank. It has never been supposed that, when a bank credits a depositor with the amount of a check left for collection, it may not be charged back to him in case it turn out to be worthless. Such a rule would occasion much inconvenience to banks, and much more to their customers. Upon a careful review of the case, we fail to find any evidence of negligence on the part of the

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defendant bank. If there was negligence on the part of any one, it was that of the plaintiffs themselves in dealing in the manner they did with an entire stranger, after warning to have nothing to do with him. In their eagerness to make a sale, they overlooked the risk; and, without waiting until assured of the genuineness of the check, they sold the goods, and advanced a large amount of money besides. Fortunately, the goods were recovered, but the money is gone unless they can make innocent parties pay it.

I have not referred to the conversation between Jesse V. H. Rapp and Mr. Cox as testified to by the former, for the reason that I do not regard it as bearing upon the case. Mr. Rapp was not present at the conversation between his father and Mr. Cox at the time the check was deposited, and had no knowledge of what occurred at that time except from hearsay. His version of the transaction, so derived, was flatly denied by Mr. Cox.

I have not discussed *Clews v. Bank*, 89 N. Y. 418; *Espy v. Bank*, 18 Wall. 619; *National Bank v. Banking Ass'n*, 55 N. Y. 215; and *National Park Bank v. Seaboard Bank*, 114 N. Y. 33, for the reason that I do not think they apply to the facts of this case as developed by the testimony. If it had been shown that the defendant bank had misled the plaintiffs, and that the latter had acted upon the faith of it, to their injury, we would have had a different case before us. It is true, the cause was argued upon that theory, but the facts are not so. The plaintiffs had no right to be misled by the mere credit of the check as cash; they made no inquiry at the bank after depositing the check until it was dishonored, but sold the goods and cashed the balance of the check, not only without due caution, but in the face of warning not to do so. Under such circumstances, they cannot throw their loss upon the bank.

We are of opinion that the court below committed no error in refusing to charge as requested by the plaintiffs' first and second points.

Judgment affirmed.

Statement of Facts.

J. N. RICE v. J. R. DAVIS.

APPEAL BY DEFENDANT FROM THE COURT OF COMMON PLEAS
OF LUZERNE COUNTY.

Argued April 15, 1890—Decided October 6, 1890.

1. It is a rule of public policy that an agent for the sale of property cannot at the same time act as the agent for the purchase thereof, or interest himself therein, and thus become entitled to compensation from both vendor and purchaser: *Everhart v. Searle*, 71 Pa. 256; *Penna. R. Co. v. Flanigan*, 112 Pa. 558.
2. Such a rule, intended to be preventive of the possibility of wrong, rather than remedial of actual wrong done, should be rigidly enforced, unless it clearly appear that the persons for whose protection it is intended agreed expressly, with a knowledge of all the circumstances, to waive their rights thereunder.
3. If an agent of the owner for the sale of stock receive from a purchaser thereof compensation for his services, the fact that such receipt was with the knowledge and without the objection of the vendor, will not constitute a waiver of the rule and preserve the right of the agent to be compensated by the vendor.

Before STERRETT, GREEN, CLARK, WILLIAMS and MCCOLLUM, JJ.

No. 235 January Term 1890, Sup. Ct.; court below, No. 113 March Term 1886, C. P.

On February 23, 1886, Dr. J. N. Rice brought assumpsit against John R. Davis. Issue.

At the trial on December 5, 1889, the plaintiff adduced evidence to the effect that he was employed by the defendant to sell for him his interest, to wit, forty shares of the capital of the Clear Spring Coal Company; that, if he sold the shares for \$45,000, he was to be paid well for his services, and that he had made sale of said shares to DeWitt and Cake for the sum stated. The substance of the defendant's evidence was that, although he had put the shares into the hands of the plaintiff for sale, the plaintiff was not to be paid compensation, unless he found a purchaser for the shares at the sum of \$50,000; that the plaintiff found certain purchasers at the sum of \$45,000,

136	439
154	830
136	439
173	99
136	439
185	544
136	439
1106	208

136	43
28	SC 27

136	439
32	SC 65
136	439
34	SC 202

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but that Cake and DeWitt, who were shareholders with the defendant, objected to one of them as a shareholder of the company, and offered to purchase the defendant's shares themselves, with the others of the proposed purchasers, for \$45,000; that the defendant declined to deal with this proposition, unless he was released from the arrangement with the plaintiff; that Cake and DeWitt and the defendant himself had interviews with the plaintiff, and the latter accordingly released the defendant, and a sale by the defendant himself to Cake, DeWitt and the others at \$45,000 was then completed. It was also shown that the plaintiff received from the purchasers four shares of the stock, valued at \$1,500, as compensation for his services, and that these shares were so turned over to the plaintiff with the knowledge and without the objection of the defendant.

At the close of the testimony, the court, **WOODWARD, J.**, submitted to the jury to find what the contract between the plaintiff and defendant was, answering certain points for instruction as shown in the opinion of the Supreme Court. The jury returned a verdict for the plaintiff for \$800. Judgment having been entered, the defendant took this appeal assigning the answers to said points for error.

Mr. Henry W. Palmer, for the appellant.

Counsel cited: *Everhart v. Searle*, 71 Pa. 259; *Penna. R. Co. v. Flanigan*, 112 Pa. 558; *Utica Ins. Co. v. Insurance Co.*, 17 Barb. 134; *Campbell v. Insurance Co.*, 2 Wh. 55; *Paley on Agency*, 32.

Mr. Alexander Farnham (with him *Mr. F. C. Mosier*), for the appellee.

Counsel cited: *Ritter v. Railroad Co.*, 7 W. N. 122; *Reed v. Reed*, 82 Pa. 420; *Pearsoll v. Chapin*, 44 Pa. 9.

OPINION, MR. JUSTICE STERRETT:

In reaching the conclusion embodied in their verdict, the jury must have found as a fact that plaintiff was employed by defendant to sell his stock in the Clear Spring Coal Company, and that he succeeded in doing so. If there was nothing else in the case, the judgment should be affirmed; but it was

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clearly shown by plaintiff's own evidence that he received from the purchasers, for his services in the matter, four shares of the stock, worth about \$4,500.

In view of that evidence, the defendant requested the court to charge that, "under the testimony of the plaintiff and his witnesses, the plaintiff received compensation from the purchasers of the Davis shares, and therefore cannot maintain this action for compensation from Mr. Davis." The plaintiff, on the other hand, asked the court to charge: "If the jury believe that Mr. Davis agreed to pay Dr. Rice a compensation for his services in effecting a sale of the interest of Mr. Davis in the Clear Spring Coal Company for \$45,000 and that he effected a sale accordingly, at the price agreed on, he is entitled to recover the value of his services to defendant; and, it being admitted by the defendant and shown by documentary evidence in the case, that the defendant knew Dr. Rice was to receive four shares of stock from the purchasers, and the defendant consenting, the fact of Dr. Rice's receiving said shares does not operate to prevent the plaintiff's recovering."

These points were answered together, as follows: "If the jury find that Dr. Rice, under the agreement with Davis, made sale of the property at a price fixed by the defendant himself, and thereby entitled himself to compensation for his services rendered, then the fact that he received four shares of stock from the purchasers, in the manner described by the witnesses and with the full knowledge of the defendant as to the nature of the transaction, would not prevent, in our judgment, his recovering in this action. We say, further, in this connection; the evidence in this case shows that all the parties were members of the same company; that DeWitt and Cake knew that Dr. Rice was claiming a commission from Davis; and it also shows that Davis knew that Dr. Rice was to have four shares of the stock of the company. Knowledge of these facts by all the parties, without complaint or dissent at the time, and without any evidence of bad faith in the transaction, takes the case out of the class of cases to which we have been referred, where it has been held that an agent is not to be allowed compensation from both parties to a sale. With every disposition to recognize the force of the decisions to which the learned gentlemen have called our attention, we do not think that they ap-

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ply to the case in hand, and control our charge on the legal questions involved, in the manner argued by defendant's counsel." This answer is an emphatic affirmance of the plaintiff's point, and a refusal to charge as requested by the defendant. It is contended that in so doing the learned judge unintentionally erred, and we think he did.

The principle, underlying this case, that an agent for the sale of property cannot at the same time act as agent for the purchase thereof, or interest himself therein, and thus entitle himself to compensation from both vendor and vendee, is grounded on the infallible declaration that "no man can serve two masters." As a rule of public policy, it is distinctly recognized in our text-books on agency, and in numerous adjudicated cases, among which are *Everhart v. Searle*, 71 Pa. 256; *Penna. R. Co. v. Flanigan*, 112 Pa. 558, and cases there cited. It forbids that any one intrusted with the interests of others shall in any manner make the business an object of personal interest to himself, because, from a frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interests at the expense of his principal. The various forms of agency to which the principle is applicable, and the reasons for upholding it, etc., are referred to in *Everhart v. Searle*, *supra*. The controlling facts in that case were briefly these: Flagg, the owner of land, employed Searle to sell the same, and agreed to give him for his services all that he obtained over \$125 per acre. Searle found several applicants for the land, but he finally agreed to give Everhart the preference, for which the latter agreed to pay him \$500. Flagg and Everhart were brought together, and the sale was concluded. They each refused to pay Searle anything, because, by acting for both of them he had undertaken to serve two masters. Suit was then brought against Everhart, and judgment obtained for the \$500, and interest. On behalf of the defendant in error, it was contended that Searle neither did nor contemplated any wrong against either vendor or vendee; that neither of them was induced to act by any false representation made by him; that Flagg got his price for the land, and Everhart secured the preference for which he was willing to pay \$500, and hence there was no error in permitting the plaintiff to recover. Referring to the position thus assumed, Chief Jus-

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tice THOMPSON said there was plausibility and seeming force in the argument that Flagg, the plaintiff's principal in the sale, was not injured by the arrangement with the defendant, etc., but it is unsound. The transaction is to be regarded as against the policy of the law. It matters not that no fraud was meditated, and no injury done. The rule is not intended to be remedial of actual wrong, but preventive of the possibility of it.

Further consideration of the principle or rule of public policy, invoked by defendant, is unnecessary. Its existence was not questioned by the learned judge of the Common Pleas. On the contrary, he was disposed to recognize the force of the decisions that were cited in support of it, but came to the conclusion that they did not apply to the case in hand, because, as he says, the evidence shows that all the parties were members of the same company; that DeWitt and Cake knew that Dr. Rice was claiming commissions from Davis, and the latter knew that Rice was to have four shares of the stock; that knowledge of these facts by all the parties, without complaint or dissent at the time, and without any evidence of bad faith in the transaction, is sufficient to take the case out of that class of cases in which it has been held that an agent is not to be allowed compensation from both the parties to a sale. It is not by any means clear that all the facts, thus assumed by the court, were either proved or admitted, or that the jury would have been warranted in finding them to be true; but, assuming, for the sake of argument, that they were conclusively established, they are at best only evidence that the parties assented to the arrangement, and agreed to waive the rule of public policy now insisted on by the defendant.

Conceding, for the sake of argument, that it would be competent for persons, circumstanced as the parties in this case were, to waive or suspend, by mutual agreement, the operation of a rule of public policy, it cannot be successfully contended that such agreement may be inferred either from knowledge of the fact that such rule has been violated, or from silence or failure to dissent at the time, or from all these combined. Nothing short of clear and satisfactory proof of an express agreement to do so should be regarded as sufficient for that purpose. In the case at bar, there appears to be no evidence that would warrant either court or jury in saying that the rule

Syllabus.

now insisted on by the defendant was waived by him. He had a right to be silent, even if he knew that the plaintiff had undertaken to serve two masters, and intended to claim compensation from both. His own testimony explains why no objections were interposed.

For reasons above suggested, we are of opinion that the learned judge erred, not only in his answer affirming plaintiff's first point, but also in refusing to affirm defendant's second point for charge. Rules of law, such as that under consideration, intended to be preventive of the possibility of wrong, rather than remedial of actual wrong, should be rigidly enforced, unless it clearly appears that the parties, for whose protection they were intended, have, with full knowledge of all the circumstances, agreed to waive their rights thereunder.

Judgment reversed.

MIDLAND MINING CO. v. LEHIGH V. COAL CO.

APPEAL BY PLAINTIFF FROM THE COURT OF COMMON PLEAS
OF CENTRE COUNTY.

Argued April 22, 1890—Decided October 6, 1890.

[To be reported.]

1. A warrant with a survey thereon, duly returned and accepted, gives the warrantee a title to the land covered by it. A junior warrant located on the same land confers no title, for the commonwealth had none to grant.
 - (a) Tracts now owned by the plaintiff were returned into the land office as surveyed north of and adjoining older surveys now owned by the defendant, and the north line of the older tracts was described by its monuments actually on the ground as the south line of the younger.
 - (b) The deeds from the patentee down to the plaintiff followed the description given by the return of survey. Testimony was offered on the trial to show that, notwithstanding the official description and calls, the plaintiff's tracts were in fact located on top of the older warrants for which they called:
2. The evidence offered was irrelevant and immaterial for the following reasons: (1) It showed no title derived from the commonwealth, because her title passed under the first warrant and survey. (2) Moreover, it showed no title derived from the patentee of the first surveys, because (c) Although the owner of both blocks, when he sold the surveys

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now owned by the plaintiff, he followed the official description of the younger surveys, in his deed, and bounded his grantees on the south by the north line of the older surveys, a well known and plainly marked line on the ground; (d) he neither did nor said anything to mislead his vendees or induce them to think the land he sold them lay elsewhere than on the north of the older surveys; and (e) the north line of the older warrants was actually pointed out on the ground as the south line of the younger block to purchasers through whom the plaintiff claims.

3. The vendee, on discovering that he had purchased several tracts having no actual existence, might proceed against the vendor on his covenant or rescind the contract in toto, but could not go over the recognized lines of his purchase and appropriate a corresponding amount of his vendor's adjoining land.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, McCOLLUM and MITCHELL, JJ.

No. 18 January Term 1890, Sup. Ct.; court below, No. 111 April Term 1885, C. P.

To the first Monday of April, 1885, the Midland Mining Company brought ejectment against the Lehigh Valley Coal Company, Charles F. Berwind, Allison White and Edward F. Berwind, for four contiguous tracts of land in Snow Shoe township, Centre county, described in the writ as having been surveyed December 13, 1792, in pursuance of warrants dated July 31, 1792, in the names of Andrew Bayard, William Bingham, George Harrison and Tench Francis, respectively. The defendants pleaded not guilty.

At the trial on August 16, 1887, before Mr. Justice WILLIAMS, then president judge of the 4th district, to whom, by agreement of the parties, the case was referred for trial without a jury under the act of April 22, 1874, P. L. 109, the plaintiff, in its case in chief, put in evidence the warrants and official surveys above referred to; patents in pursuance thereof, dated March 10, 1852, and granted to Jacob, Joseph and Benjamin Gratz; a deed from said patentees to John K. Smith, Edward K. Smith and Charles M. Taylor, dated April 1, 1852, and recorded May 12, 1852, for seventeen tracts of land, including the four above named; a regular chain of title from the grantees in said deed down to the plaintiff; and the sheriff's return to the writ of ejectment served upon the defendants. The following facts appeared from the plaintiff's title papers: The four surveys, in the names of Andrew Bayard, William Bing-

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ham, George Harrison and Tench Francis, were parts of a large block of surveys known as the Aaron Levy block, and were in the southern tier thereof. In the official surveys, and in the patents, these tracts were described as bounded on the south by lands of Samuel Whittaker, James Whittaker, Paul Betz and Peter Betz respectively. The descriptions in the deed from the patentees to J. K. Smith and others, of the several tracts thereby conveyed, were copied from the descriptions given in the respective patents, and in all the subsequent conveyances in the plaintiff's chain of title the same descriptions were repeated.

The defendants, in their case in chief, put in evidence warrants dated July 3, 1792, in the names of Peter Betz, Paul Betz, James Whittaker and Samuel Whittaker; surveys made in pursuance thereof on July 18 and 14, 1792; tax sales under which the Betz and Whittaker tracts were conveyed to Jacob and Joseph Gratz in 1836; patents therefor granted to Jacob and Joseph Gratz in 1849 and 1850; will of Jacob Gratz, probated January 14, 1857, devising all his real estate to his son, Robert H. Gratz; deed dated April 1, 1857, from Joseph, Benjamin and Robert H. Gratz to William A. Thomas for one hundred and six tracts, including the Betz and Whittaker tracts; and subsequent conveyances by which the title of Thomas was vested in the Lehigh Valley Coal Company. The defendants then called witnesses whose testimony tended to prove that the lines of the Betz and Whittaker surveys, which were part of a block known as the Samuel Wallis block, and also as the Andrew Chapman block, were actually run and marked upon the ground as returned; that the northern line of that block was a well known and well marked line; that in 1854, when Taylor, one of the grantees in the deed made by the Gratzes in 1852, under which the plaintiff claimed, sold his undivided interest in the land therein described to Daniel Rhoads, he pointed out to Rhoads said marked line as the southern boundary of the Levy block, and in 1868 the other remaining grantees in that deed, and Rhoads, sold by that line; and that the defendants never were in possession of any land north of that line.

In rebuttal, the plaintiff offered to prove by certain surveyors that the block of surveys, consisting of fifty tracts, made

Statement of Facts.

upon warrants dated July 31, 1792, including the four tracts, viz., Andrew Bayard, William Bingham, George Harrison and Tench Francis, in dispute in the case, is well located on the ground, and that, as it is located on the ground, it interferes with the block of surveys made upon warrants dated July 8, 1792, to the extent of one tier of tracts; that the Tench Francis is located upon and covers the same ground as the Peter Betz, claimed by defendants; that the George Harrison is located upon and covers the same ground as the Paul Betz, claimed by defendants; that the William Bingham is located upon and covers the same ground as the James Whittaker, claimed by defendants; and that the Andrew Bayard is located upon and covers the same ground as the Samuel Whittaker, claimed by defendants; the title papers already in evidence showing that both sets of tracts were owned by Jacob, Joseph and Benjamin Gratz, from 1836 to 1852, when they sold and conveyed the Andrew Bayard, William Bingham, George Harrison and Tench Francis, inter alia, to John K. Smith, Edward K. Smith and Charles M. Taylor, under whom plaintiff claims, and did not convey or attempt to convey the Peter Betz, Paul Betz, James Whittaker and Samuel Whittaker to William A. Thomas, under whom the defendants claim, until 1857.

The offer was objected to by the defendants for the reasons, in substance, (1) that it proposed to show a location of the warrants, under which the plaintiff claimed, upon land which did not belong to the commonwealth at the date of the location; (2) because the descriptions in the deed of April 1, 1852, and the subsequent deeds under which the plaintiff claimed, were notice that the land conveyed by those deeds extended no further south than the northern line of the Betz and Whittaker surveys, and estopped the plaintiff from claiming thereunder any land south of said line; and (3) that the offer was incompetent as an attempt to contradict the boundaries specified in the plaintiff's title deeds.

By the court: I should have preferred personally to dispose of this question as I understand the practice under the act of assembly under which this cause is being tried, but I recognize the right of the defendants to raise the question in this manner and my obligation to meet it. I have given to the question some little thought and listened attentively, with a desire to in-

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form myself as fully as possible, to the arguments made upon this question. I have, however, a distinct and definite opinion about the rule in this case. We will put our ruling upon the record so that if we are mistaken there will be no trouble about correcting it. We sustain the objection to the admissibility of this evidence, and we do it upon the view of the law that we now state: We are inclined to hold, first, that where the conveyance describes land by reference to adjoiners and well marked lines on the ground, and also by reference to the name of the warrantee, and these are at variance, the lines on the ground must be followed and the other words of the description must give way. We think that is the fundamental rule governing this whole class of questions. We are inclined to hold that, conceding a mistake to have been made by the deputy surveyor, yet the real question here is, what land passed to the plaintiff in his deed from Jacob Gratz and others; and, that deed being clear and distinct in its descriptions, so far as the marks on the ground were concerned, the plaintiff is limited to the marks actually found in accordance with the descriptions of the deed; and the fact that the land embraced within those lines is called by a wrong warrantee name, has no effect to extend the right of the claim of the plaintiff; exception.¹

The decision of the court was filed on August 26, 1887. It recited the respective chains of titles put in evidence by the parties, and the facts appearing upon the face thereof and found from the evidence, as above stated, and embraced the following additional

FINDINGS OF FACT.

4. That the tracts of land in the warrant names of Peter Betz, Paul Betz, James Whittaker, and Samuel Whittaker, were well located upon the ground by the surveyors in 1792, as returned into the land office; and their location is established by the evidence in this cause, and is conceded by the plaintiff, the north line thereof, being well marked upon the ground, at the distance of about two miles north from the two sugars, an original corner in the survey of the Andrew Chapman block.

6. . . . [That by these descriptions (of the four tracts claimed by the plaintiff, as given in the deed from Joseph

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Gratz et al. to J. K. Smith et al., dated April 1, 1852), the southern lines of the said four tracts are fixed at and upon the northern lines of the defendants' older tracts, in the names of Peter Betz, Paul Betz, James Whittaker, and Samuel Whittaker, and the grantees in said deed and their successors in title acquired no right thereby, to land south of the said northern line of the defendants' surveys.]³

10. That the northern boundary line of the defendants' tracts, in the names of Peter Betz, Paul Betz, James Whittaker, and Samuel Whittaker, are the southern lines respectively of the plaintiff's tracts, in the names of Tench Francis, George Harrison, William Bingham, and Andrew Bayard; and that the said lines are well marked upon the ground.

11. [That the plaintiff has shown no title to land lying on the south of the northern lines of the tracts in the names of Peter Betz, Paul Betz, James Whittaker, and Samuel Whittaker.]⁶

12. [That the defendants are not in the possession of any part of the lands described in the plaintiff's writ, and were not in possession at the time of the service of the summons in ejectment in this cause.]⁷

13. That the said north line of the defendants' four tracts was recognized as the south line of the plaintiff's tracts, when they were conveyed to Daniel Rhoads by E. K. Smith, John K. Smith and Charles M. Taylor, and by Daniel Rhoads, when he made the conveyance of the said tracts through which the plaintiff derives title.

CONCLUSIONS OF LAW.

The court finds the legal rules applicable to and controlling this case as follows:

1. Natural monuments or surveyors' marks, made upon the ground, fix the location of a survey which calls for them, and, in such case, courses and distances may be disregarded.

2. [Calls for an older survey, actually located by marked lines upon the ground must be followed; and, in such case, calls for younger surveys of the same date with that in controversy may be disregarded.]⁹

8. [The call by the official surveys of the plaintiff's tracts for the north lines of the defendants' older surveys, which were well marked upon the ground as their southern boundary,

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excludes them from the land south of those lines, and from the land covered by defendants' tracts.] ¹⁰

4. [That the defendants are not estopped from insisting upon such location of the plaintiff's surveys, by the deed of Jacob Gratz and others to E. K. Smith, J. K. Smith and C. M. Taylor; for the reason that said deed described the tracts conveyed as they are described in the official surveys, as lying north of the Peter Betz and other tracts of defendants and could not, therefore, mislead the grantees as to the true location of the lands purchased by them.] ¹¹

5. [That the plaintiff is not entitled to recover in this case.] ¹²

And now 18th August 1887, the court, upon the issue joined in this case, finds in favor of the defendants.

Exceptions to the findings of fact and conclusions of law, set forth in the decision, were filed by the plaintiff. On October 17, 1887, Mr. Justice WILLIAMS having taken his seat upon the Supreme Bench, the parties agreed that the exceptions should be disposed of by FURST, P. J., of the 49th district, and the same day a decree was made overruling the exceptions and entering judgment for the defendants. Subsequently the plaintiff took this appeal, assigning for error:

1. The refusal of plaintiff's offer.¹

3, 6, 7. The findings of fact embraced in [] ^{3 6 7}

9-12. The conclusions of law embraced in [] ^{9 to 12}

Mr. S. S. Blair and *Mr. John H. Orvis* (with them *Mr. H. T. Harvey*, *Mr. C. M. Bower* and *Mr. Ellis L. Orvis*), for the appellant:

1. The first assignment covers the main and controlling question in the case, viz., what is the proper construction of the deed from Joseph Gratz and others to John K. Smith and others? The effect of the ruling of the court, complained of, is that the deed did not convey all of the seventeen tracts described in it, but only as many of them as lay north of the northern line of the Wallis block of surveys. The words of the deed are unambiguous. It will be observed that it does not convey a body of land as a single tract, but seventeen different tracts, each one separately described, the descriptions

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being copied from the patent in each case, and the descriptions in the patents being taken from the official surveys. The legal effect of the deed is the same as if seventeen separate conveyances had been made. According to the ruling of the court below, if this had been done the conveyances for the four tracts in controversy here would have been mere nullities, conveying nothing at all, because the Betz and Whittaker tracts are called for as the southern adjoiners, and between those tracts and the northern adjoiners called for there was no land to be conveyed. The vice of this argument is in ignoring everything in the descriptions but the adjoiners on the south.

2. The tracts are accurately described according to the official surveys and by reference to the warrants. The mistake as to the southern boundary was not that of the grantors or the scrivener, but of the deputy surveyor who located the tracts on the ground. That such a mistake cannot vitiate a deed, is clear: *Stewart v. Shoenfelt*, 13 S. & R. 368; *Commonwealth v. McDonald*, 16 S. & R. 398; *Seckel v. Engle*, 2 R. 67. A conveyance of land described as a tract surveyed to a particular person, passes all within the lines of the survey, although the grantor may have had a better title to the land than that described: *Armstrong v. Boyd*, 3 P. & W. 458. Calls for adjoiners must give way to the lines actually run and marked upon the ground: *Lilly v. Kitzmiller*, 1 Y. 28; *Gratz v. Hoover*, 16 Pa. 232; *Malone v. Sallada*, 48 Pa. 419; *McGowan v. Ahl*, 53 Pa. 84; *Wood v. Appal*, 63 Pa. 210; *Watson v. Jones*, 85 Pa. 117; *Pruner v. Brisbin*, 98 Pa. 202; *Arnold v. Pfoutz*, 117 Pa. 103. If the latter clause of the second finding of law was meant to apply to calls for surveys of the same date which have their lines marked on the ground, we dissent in toto from the proposition. If a tract has no marked lines of its own, all its calls must be regarded; if all cannot be answered, the location must be taken which will answer the greatest number, and if any of the adjoining tracts belong to the same block, lines found for them will fix its location regardless of its calls for adjoiners: *Malone v. Sallada*, 48 Pa. 425; *McDermott v. Hoffman*, 70 Pa. 47; *Eister v. Paul*, 54 Pa. 196; *Lumbering Co. v. Barber*, 87 Pa. 313; *Pruner v. Brisbin*, 98 Pa. 202; *Cross v. Tyrone Co.*, 121 Pa. 887.

3. We should have been permitted to prove, by the lines

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actually run and marked for the Levy block, that the four tracts claimed by the plaintiff occupied the identical land which the four tracts claimed by the defendants covered. Such interferences have often occurred. *Gratz v. Beates*, 45 Pa. 495, is an example. In such a case, a tax sale under the name of the younger warrant may convey a good title: *Hunter v. Albright*, 5 W. & S. 423; *McCoy v. Michew*, 7 W. & S. 386. The owner of the older warrant may estop himself by his acts and declarations from setting up his title against a purchaser of the younger title. Or, the same person may have owned both titles and conveyed the land under the name of the younger survey, thus estopping himself by deed: *Armstrong v. Boyd*, 8 P. & W. 458. In this case, we claim that Joseph, Jacob and Benjamin Gratz, having conveyed these tracts under the warrant names of Francis, Harrison, Bingham and Bayard, at a time when they were the owners of both the conflicting titles, were estopped from setting up title to the same land under the surveys in the names of Betz and Whittaker, and that the plaintiff, who claims under the first conveyance made by the Gratzes of these lands, has a better title than the defendants.

Mr. S. P. Wolverton (with him *Mr. Samuel Linn*), for the appellees.

Counsel cited: (1) As to the effect to be given to calls for adjoiners: *Brolaskey v. McClain*, 61 Pa. 163; *Mackentile v. Savoy*, 17 S. & R. 104; *Murphy v. Campbell*, 4 Pa. 485; *Cox v. Couch*, 8 Pa. 147; *Petts v. Gaw*, 15 Pa. 218; *Mathers v. Hegarty*, 37 Pa. 64; *Speakman v. Forepaugh*, 44 Pa. 372; *Bellas v. Cleaver*, 40 Pa. 260; *Manhattan Coal Co. v. Green*, 73 Pa. 310; *Watson v. Jones*, 85 Pa. 125; *Malone v. Sallada*, 48 Pa. 419; *Dreer v. Carskadden*, 48 Pa. 38; *Payne v. Howard*, 107 Pa. 583; *Koch v. Dunkel*, 90 Pa. 264; *Eister v. Paul*, 54 Pa. 198; *Parshall v. Jones*, 55 Pa. 153; *Caul v. Spring*, 2 W. 390; *Covert v. Irwin*, 3 S. & R. 288; *Mathers v. Hegarty*, 37 Pa. 67; *Bentley v. Rickabaugh*, 62 Pa. 284; *Large v. Penn*, 6 S. & R. 487; *Wilder v. Davenport*, 58 Vt. 642; *Bundy v. Morgan*, 5 Vt. 46; *Ide v. Pearce*, 9 Gray 350; *Bosworth v. Sturtevant*, 2 Cush. 392; *Davis v. Rainsford*, 17 Mass. 207; *Thatcher v. Howland*, 2 Metc. 41; *Binney v. Morrill*, 52 Me.

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256. (2) As to the estoppel of the grantee in a recorded deed from claiming, against a subsequent purchaser, land outside the lines therein given: *Kennedy v. Lubold*, 88 Pa. 257; *Lodge v. Barnett*, 46 Pa. 484; *Darrah v. Bryant*, 56 Pa. 75; *Gratz v. Beates*, 45 Pa. 504; *Mackentile v. Savoy*, 17 S. & R. 107; *Ogden v. Porterfield*, 34 Pa. 195; *Tyler's Law of Boundaries*, 287, 335, 336; *Penrose v. Griffith*, 4 Binn. 239; *Carver v. Astor*, 4 Pet. 1; *Chautauqua Co. Bank v. Risley*, 4 Den. 486; *Stow v. Wyse*, 7 Conn. 214 (18 Am. Dec. 99); *Millingar v. Sorg*, 55 Pa. 215; *Dawson v. Mills*, 32 Pa. 302; *Bender v. Pitzer*, 27 Pa. 333; *Willis v. Swartz*, 28 Pa. 413; *Hill v. Epley*, 31 Pa. 335; *Salter v. Reed*, 16 Pa. 263.

OPINION, MR. JUSTICE WILLIAMS:

The important question in this case is raised by the first assignment of error. It will be approached at best advantage along the route by which it was reached on the trial in the court below.

The plaintiff showed title out of the commonwealth to the several tracts described in the writ, as surveyed on the 13th December, 1792, in the warrantee names of Andrew Bayard, William Bingham, George Harrison, and Tench Francis, containing four hundred and thirty-three acres and one hundred and fifty-three perches each. This title was traced from the warrantees to the plaintiff. The writ and return were then put in evidence, and the plaintiff rested. The documentary evidence by which the title was traced showed that the four surveys described were part of a large block containing about fifty surveys, known as the Levy block. It also showed that the title of the warrantees was vested in Jacob Gratz, Joseph Gratz and Benjamin Gratz, to whom the patents were issued by the commonwealth on the 10th of March, 1852.

The defendants met this *prima facie* case against them by showing a survey made on the 13th of July, 1792, under four warrants previously issued in the names of Peter Betz, Paul Betz, James Whittaker, and Samuel Whittaker, for four hundred and thirty-three acres and one hundred and fifty-three perches each, and by tracing the title from the commonwealth to themselves. They then showed, by the testimony of a number of surveyors, the existence on the ground of the original

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lines locating these tracts in accordance with the return of the deputy surveyor, and that their operations were wholly within the lines of these tracts owned by them when they were served with the writ. The documentary evidence introduced by them showed that these warrants were part of a block known as the Wallis Block; that the title of the warrantees in the tracts comprising the Wallis block was acquired by Jacob, Joseph, and Benjamin Gratz, to whom patents therefor were issued in 1849 and 1850; and that the north line of their tracts was the north line of the Wallis block, which was called for by the official return of the plaintiff's tracts as their south line, and the south line of the Levy block. This was a complete answer to the plaintiff's case, and upon it the defendants were entitled to a verdict when their case closed.

The plaintiff, however, undertook to show that, notwithstanding the seniority of the surveys of the defendants and their actual location by original lines on the ground, which included the operations of the defendants, it was, nevertheless, entitled to recover. For this purpose, it offered to prove by W. P. Mitchell and others, surveyors, that the plaintiff's warrants had been originally located so as to cover the four older surveys of the defendants. This offer was rejected, and the correctness of that ruling is the question now to be considered.

It will be seen that the offer is a concession of the facts alleged by the defendants, viz., that they have the older grant from the commonwealth, the older survey of the land in controversy, and that they have correctly located their tracts on the ground. Conceding all this, the offer proposes to show that the junior surveys were located on the top of the older. What would be the legal effect of such a showing? Without more, it would be to render the younger surveys of no effect whatever. The land, having been already appropriated under the first warrants and surveys, was no longer open to purchasers, and the younger surveys, whether made by mistake or design, could confer no right whatever on the holder. This was settled as early as *Robeson v. Gibbons*, 2 R. 45. The return of survey to the land-office, and its acceptance, gave title to the warrantee: *Bunting v. Young*, 5 W. & S. 196; *Wolf v. Goddard*, 9 W. 545; *Wilhelm v. Shoop*, 6 Pa. 21. The title being out of the commonwealth when the second appropriation

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was attempted, the warrantee could acquire nothing by his survey, because the commonwealth had nothing to grant. Upon the general question raised by the offer, it is very clear, therefore, that, as the younger surveys could not affect the validity of the older ones under which the defendants showed title, the fact that they were made as alleged was no reply to the defendants' case, but was an immaterial and irrelevant fact, which if admitted could have no effect except to mislead or confuse.

But the learned counsel for the plaintiff calls attention to the fact disclosed by the conveyances, that Jacob, Joseph, and Benjamin Gratz were the owners of both blocks of surveys when in 1852 they sold out of the Levy block seventeen tracts, including the four now held by the plaintiff, to J. K. Smith, E. K. Smith, and Charles M. Taylor; and he argues with great earnestness that, by this conveyance, the title to the older surveys in the Wallis block, as well as that to the younger ones actually named and described, passed to the grantees. If such is the legal effect of the conveyance, the evidence is not irrelevant, and its rejection was erroneous.

At this point it is important to recall the state of the evidence at the time when the offer was made, as it is shown by the findings of the court below. These findings have the conclusiveness of a verdict, and they establish the following facts:

1. That the southern tier of tracts in the Levy block was returned as lying north of and adjoining the northern tier of tracts in the Wallis block and called for them as adjoiners.

2. That the four particular tracts claimed by the plaintiff were returned as lying on the north of, and calling for the four tracts claimed by defendants.

3. That the same description of the plaintiff's tracts, and the same call for the north line of the Betz and Whittaker surveys, as their southern boundary, runs through the entire chain of the plaintiff's title, from the return of survey and patent to the last deed under which it holds.

4. That the north line of the Betz and Whittaker surveys was a well-known and well-marked line on the ground.

5. That this line was known to, and recognized by the grantees of Jacob, Joseph and Benjamin Gratz, as the south line of their purchase, and shown to Daniel Rhoads as such when

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they sold to him in 1854, and by him when he sold to those under whom the plaintiff acquired title.

Now, to sustain the position of the plaintiff, and make the deeds for the Andrew Bayard and other tracts in the Levy block operative to pass title to the Betz and the Whittaker surveys in the Wallis block, one of three things must be shown: either (a) the description in the deed from John, Jacob and Benjamin Gratz to J. K. Smith et al. must be capable of such a construction as shall embrace the Betz and the Whittaker surveys; or, (b) the lines on the ground, and the calls, must embrace them; or, (c) they must have been pointed out to the purchasers as and for the tracts named in the deed, or at least some line which includes them must have been shown as a line of the tracts sold. But the negative of each of these appears clearly. The description in the deed from Gratz to Smith et al. did not embrace the Betz and Whittaker surveys, but excluded them, and called for them as adjoiners on the south. Both the calls for adjoiners and the lines on the ground excluded them. The vendees of Gratz knew the location of their south line, and pointed it out to Rhoads, their vendee, on the ground, as the north line of the Wallis block two miles north from the sugars. The title to the Betz and Whittaker surveys did not pass, therefore, from Gratz to Smith and others by the terms of the conveyance or by estoppel, and, on the evidence as it stood when the offer was made, the fact relied on by the plaintiff, that Gratz owned both blocks at the date of the deed to J. K. Smith et al., did not render the proposed evidence competent.

Armstrong v. Boyd, 3 P. & W. 458, is much relied on by the appellant. That was the case of an interference by a younger with an older survey. In 1775 Hains owned both of them. He sold the Jones, which was the younger, and conveyed it by deed describing it as a tract of land "lately laid unto Joseph Jones by certain metes and bounds in the said survey mentioned, containing one hundred and sixty-two acres, be the same more or less." This was a conveyance by the lines of the survey, and those lines were actually on the ground, and included part of the Stein, which was the older survey. The point ruled was that the deed covered the land described, and carried the right of the vendor in the same to his vendee. This is in

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accordance with the elementary rule that where one conveys land to another in fee-simple to which he has a defective title or no title at all, and afterwards acquires a good title, that title shall inure to the benefit of his vendee. The case now before us is distinguishable from *Armstrong v. Boyd*, supra, in this all-important particular: In that case, the land in controversy was clearly covered by the description in the deed, and the vendor's title must pass to his vendee unless restrained by some rule of law; in this case, it is settled by the findings of fact in the court below, and it is clear on the evidence, that the description in the deed does not by its terms include the land in controversy, but locates the land conveyed by it on the north of the Betz and Whittaker surveys and of the well-marked north line of the Wallis block.

The land in controversy, not being covered by the description in the deed, could not pass under it unless some rule of law required it. If the purchaser had been misled by having these lands pointed out to him as the lands he was purchasing, or if the south line of the Betz and Whittaker surveys had been shown him as their north line, then, under the rule laid down in *Millingar v. Sorg*, 55 Pa. 215, the vendor would not be allowed to deny that the fact was as he had represented it to be, and his title would pass to his vendee notwithstanding the description. But here again, the findings of fact in the court below, resting on uncontradicted testimony, settle the question the other way; for it appears that the vendees of Gratz knew the location of the north line of the Betz and Whittaker surveys, and pointed it out to their vendee as their south line. They understood that the land they owned and were about to sell to Rhoads and others lay wholly north of the north line of the Wallis block; so that neither were they misled as to the location of their lines, nor did they mislead their vendees. Both the description in the deed and the understanding of the parties related to a recognized and well-marked line on the ground, which does not include the land in controversy. It is apparent, therefore, that *Armstrong v. Boyd* does not rule the present case.

But it is said that the ground between the north and south lines of the Levy block is too narrow, if the south line be located along the north line of the Wallis, to accommodate all the

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members of the block, and that one whole tier will thus be squeezed out. Let us assume that this is true. Let us go further, and assume, what is by no means clear, that the southern tier is the one that will lose its place. What, then, is the remedy for the purchaser? He has bought and paid for several tracts, one or more of which has no actual existence on the ground. Shall he proceed against his vendor on his covenants, or shall he rescind the contract in toto? He may make his election, and his remedy is enforceable in either case by action. But the remedy on which the appellant insists is the right to go over the marked and recognized lines of his purchase, and appropriate the adjoining lands of his vendor to an amount equal to that which he finds to be the shortage within his lines, without regard to their relative value per acre. Such a mode of redress cannot be sanctioned by a court of law. It is not supported by *Armstrong v. Boyd*, nor by *Seckel v. Engle*, 2 R. 68, nor by the doctrine of estoppel which was applied in *Millingar v. Sorg*, 55 Pa. 215. As we have already seen, *Armstrong v. Boyd* was the case of a sale of land which was clearly described in the deed by lines which included the interference. In *Millingar v. Sorg* the purchaser was taken on the ground and put into possession of a lot which was on a different warrant from that named in the deed. In both cases, the court had regard to the land inclosed by the lines, whether these were ascertained from the deed or were actually shown on the ground; and, when the description differed from the lines pointed out, the latter were adhered to, and the description in the deed so far disregarded.

After careful examination of the cases cited, and of the argument of the experienced and able counsel of the appellant, we think the offer to prove that the plaintiff's younger surveys were laid upon the defendants' older ones was properly rejected. The land, which it was thus proposed to appropriate to the Bayard and the other tracts of the plaintiff, was not covered by the description in the deeds under which the plaintiff acquired title, but was excluded therefrom by the lines of the survey referred to, and made part of the description. It was not pointed out to the purchaser as the land sold, but, on the other hand, the marked line on the north of the Betz and Whittaker surveys was recognized as the south line of their

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lands by the vendees of Gratz, and they pointed it out as such to their vendees when they sold.

The judgment is affirmed.

CONTESTED ELECTION OF OWEN CUSICK.**APPEAL BY RESPONDENT FROM THE COURT OF QUARTER SESSIONS OF LACKAWANNA COUNTY.**

Argued April 23, 1890—Decided October 6, 1890.

[To be reported.]

1. The constitution having fixed the qualifications of voters, it is not in the power of the legislature either to enlarge or abridge them; but legislation may be enacted which merely regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself.
2. The constitution having provided no machinery for ascertaining whether a particular voter possesses the requisite qualifications, the legislature has power to prescribe the form and nature of the proof by which unregistered electors must establish the existence of a right to vote under the constitution.
3. The requirements of § 10, act of January 30, 1874, P. L. 31, as to what the affidavits of unregistered electors shall contain, are not unreasonable nor in conflict with the constitution; and, as a reasonable certainty in the affidavits is all that the law requires, there is no practical difficulty in complying with them.
4. The primary object of said act of 1874 is to prevent fraudulent voting, and it must be so construed as best to carry out that intent; the affidavit of the unregistered voter must therefore be sufficiently specific to show upon its face that he has the right claimed, and also to found thereon an indictment for perjury.
5. In view of the object aimed at, and of the positive prohibitions and penal provisions contained in other sections of the act, the provisions of § 10 are not merely directory but are mandatory, and an unregistered elector, whose affidavit is not in compliance therewith, is not entitled to vote.
6. A general affidavit averring, in the language of the constitution, the possession of the qualifications therein prescribed, but omitting to give the more specific matters as to residence, taxes, and citizenship, required by said section, is insufficient to authorize the reception of a vote from an unregistered person.
7. When an affidavit was in fact properly made, but the election officer neglected to subscribe the jurat, the defect can be cured and the paper

136	450
116	540
136	450
100	417

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reformed upon due proof; but affidavits cannot be reformed by wholesale, and each separate paper requires its independent proof.

8. When a petition to contest an election charges frauds in certain districts only, but the answer makes counter-charges of frauds in other districts, and the testimony admitted under the answer discloses fraudulent votes for the respondent in the latter, the contestants may take advantage of and use such testimony.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 306 January Term 1890, Sup. Ct.; court below, No. 12 January Term 1889, Q. S.

On December 3, 1888, certain electors of the county of Lackawanna filed in the court below a petition contesting the election of Owen Cusick to the office of clerk of the courts of said county. The petition specified certain election districts, in which, as the contestants averred, fraudulent and illegal votes had been cast for the respondent. The respondent answered the petition, denying its allegations, and averring that illegal votes against him had been received and counted in every district in the county. Thereupon, *Mr. John P. Albro* and *Mr. Thomas J. Duggan* were appointed examiners, under the provisions of the act of May 19, 1874, P. L. 208, to take and report the testimony.

A large mass of testimony was taken on the part of the contestants and the respondents respectively. This testimony was digested by the examiners, who reported to the court the names of such persons as, in their opinion, voted illegally at the election in question, together with the facts upon which their conclusions were founded. Thereupon, the respective counsel for the contestants and the respondent filed motions in regard to the disposition to be made of the questions of law arising upon the examiner's report.

Certain persons were reported by the examiners as having voted without being registered, but after filing affidavits in the following form:

AFFIDAVIT OF NON REGISTERED VOTER.

I, ... being duly sworn, say: That I am twenty-one years of age, and have been a citizen of the United States at least one month and resided in the State of Pennsyl-

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vania one year immediately preceding the 6th day of November, 1888; that I have resided in the of, ... two months immediately preceding the 6th day of November, 1888; that I have paid a state or county tax within two years, which tax was assessed at least two months before, and paid one month before November 6th, 1888; that I have not moved into the said district for the purpose of voting therein.

AFFIDAVIT OF WITNESS.

I, ... being duly sworn, say: that I am acquainted with the above named and know that he has resided in the above named election district for at least two months immediately preceding the 6th day of November, 1888; and that I am a qualified voter in said district.

Personally appeared the above named voter and witness, and made oath that the facts stated by them are true and correct.

November 6, 1888.

Such affidavits were reported by the examiners to be defective, for the reasons: (a) Because they did not state when and where the voter was born, nor whether a native born or a naturalized citizen, and, if the latter, when and where he was naturalized; (b) because they did not state when and where the tax referred to was assessed, nor when and where or to whom paid; (c) because there was no jurat to the voter's affidavit; (d) because the accompanying affidavit of the witness did not state the particular place where the voter had resided for the preceding two months, and because the jurat to the latter affidavit did not state that either of the affidavits was subscribed by the witness or voter.

The respondent's counsel moved the court to strike from the examiner's report the names of all persons reported to have voted upon such affidavits; to declare such affidavits legal and in compliance with the requirements necessary to entitle non-registered electors to vote; and to declare legal all votes cast by such persons, unless it appeared that the voter was otherwise disqualified.

By the court: Motion refused; exception.¹

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The respondent's counsel moved also that the names of certain persons reported by the examiners to have voted illegally be stricken from the report, for the reason that said names were reported at the request of the contestants, and the districts in which said persons voted were not averred in the contestants' petition.

By the court: We find, as a fact, in response to this motion, that the illegality of the voters named therein is established by evidence introduced into the case by the respondent himself and not by the contestants, and with respect to districts brought into the controversy by being named in the respondent's answer. We hold that the contestants had the right to take advantage of the evidence so introduced and therefore refuse this motion; exception.³

In a large number of the affidavits of voters and witnesses, returned by the election officers of various districts, there were no signatures to the jurats. The respondent's counsel moved the court to make an order authorizing and empowering the proper election officers of twenty-three specified districts "to come into court, on a day to be fixed, and sign such of the jurats of the various voters' and witnesses' affidavits as are not signed, it appearing from the testimony, taken by the examiners and now on file in the clerk's office, that such voters and witnesses were severally and legally sworn to their said affidavits, and that the failure to sign said jurats by the proper officers was merely an omission or mistake on the part of said election officers."

By the court: It does not appear from the testimony, taken by the examiners and now on file in the clerk's office, as assumed in this motion, nor can we find as a fact, that any certain voters or their witnesses at the election in question were severally and legally sworn to affidavits required of them as non-registered voters, and that the proper election officers failed to sign the jurats thereto by the omission or mistake of said officers, nor are we sufficiently informed by said motion to what particular voters it is intended to apply. The motion is therefore overruled; exception.³

The counsel for the contestants filed motions praying the court to declare illegal, and exclude from the count, the votes cast by the following classes of persons:

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(a) Certain specified voters, to the number of 859, who, not being registered, filed affidavits which were held by the examiners to be defective, in that they did not state when and where the tax claimed to have been paid by the affidavits was assessed.⁴

(b) Eighty-three persons named, who were not registered and filed affidavits held by the examiners not to be in conformity with the requirements of the law, for the reason that said affidavits, while stating that the affiants were naturalized citizens, did not state when, where, and by what courts they were naturalized.⁵

(c) Certain persons, not registered, who filed affidavits not stating, to the best of the affiant's knowledge and belief, where they were born, nor whether they were born in or out of the United States, nor that they were ever naturalized, either by themselves or through the naturalization of their parents.⁶

(d) Certain unregistered voters, numbering 805, who filed affidavits reported to be defective in that they did not state when, where, and to whom a tax was paid.⁷

By the court: Motions granted; exceptions.^{4 to 7}

The court, in an opinion by ARCHBALD, P. J., after discussing the various motions made, and the questions thereby raised, found, as the result of the deduction of the votes declared by its rulings to have been illegally cast, that John H. Thomas received the greatest number of legal votes cast at the election in question, and was duly elected to the office of clerk of the courts of Lackawanna county. A formal decree to that effect, with a direction that the costs of the proceeding be paid by the county of Lackawanna, was then entered; exception.⁸

Thereupon, the respondent took this appeal, assigning for error:

1-3. The refusal of the respondent's motions.^{1 to 3}

4-7. The allowance of the contestants' motions.^{4 to 7}

8. The final decree of the court.⁸

Mr. Thomas F. Wells and *Mr. I. H. Burns* (with them *Mr. Joseph O'Brien*), for the appellant:

1. The important question, raised in this case, is as to the proof to be required of unregistered voters. Few, if any, of

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the affidavits filed failed to state that the voter possessed the qualifications called for by the constitution, viz., that he was a citizen of the United States; that he had resided in the state one year, etc.; that he had resided in the election district two months, etc.; that he had, if twenty-two years of age or over, paid a state or county tax which was assessed at least two months and paid at least one month, etc. It was not because the affidavits failed to prove these facts, but because they did not set forth matters not demanded by the constitution, and which in most cases it is impossible to give, that these voters were disfranchised.

2. We contend that the provisions of § 10, act of January 30, 1874, P. L. 31, to the effect that the affidavits shall state the matters for want of which the court below held these affidavits defective, are directory merely, and not mandatory. Words that are affirmative and relate to the manner in which the jurisdiction of an officer shall be exercised, if not followed by words of positive prohibition, will be construed as directory: *Bladen v. Philadelphia*, 60 Pa. 466; *Pearse v. Morrice*, 2 Ad. & E. 96; *Pittsburgh v. Coursin*, 74 Pa. 400; *Hershberger v. Pittsburgh*, 115 Pa. 86. When the unregistered voter swears that he has the constitutional qualifications of an elector, he is presumptively qualified. This being the essence of the thing required, the other provisions of the statute are directory: *Rex v. Loxdale*, 1 Burr. 447.

3. If the provisions of the statute that are outside the constitution are to be construed as mandatory, the legislature had no power to make them so. The constitution specifies the qualifications of a voter, and it is beyond the power of the legislature to require anything more. If it may disfranchise a man because he cannot tell to whom he paid his tax, or just when it was assessed, why may it not be required also that he shall be able to read his affidavit to the election board, or to write his name at the foot of it? It is unreasonable to require a statement of the matters specified in the statute. While the legislature may specify the quality and quantity of the proof to be given, e. g., whether it shall be written or oral, whether by one witness or by two, it cannot say that, for the purpose of establishing one fact, another independent fact shall be proved, even though there be some connection between the two.

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4. McDonough's Case, 105 Pa. 488, does not rule the present case, as there were no affidavits before the court therein, and the question of their contents could not possibly have been decided. To say the least, the registry act of 1874 is an obstacle in the way of the unregistered voter, of the kind described in *Page v. Allen*, 58 Pa. 338, and *Commonwealth v. Maxwell*, 27 Pa. 444, as unconstitutional, because unnecessarily embarrassing the right of election. And, in refusing to allow the election officers to come in and perfect jurats to affidavits, the court admits in a general way that mistakes had been made by some officers, and, as it seems to us, it was the duty of the court to fix a day when such officers should come in, and in the presence of the court correct such affidavits as it should then adjudge to be the proper subjects of correction.

Mr. Everett Warren (with him *Mr. Henry A. Knapp*), for the appellees:

1. The registry act of 1874 is a valid law, and its provisions are mandatory and imperative: *McDonough's Case*, 105 Pa. 488. They are mandatory by every principle and rule of interpretation. In § 3, there are negative words of prohibition: *Pearse v. Morrice*, 2 Ad. & E. 96; *Bladen v. Philadelphia*, 60 Pa. 464; *Endlich on Statutes*, § 432; *Low v. Dunham*, 61 Me. 566; *Cooley on Const. Lim.*, 5th ed., 88; *McCrary on Elections*, §§ 192 et seq.; and disregard of this prohibition is made by § 12 punishable by fine and imprisonment: *State v. Hilman-tel*, 21 Wis. 574; *State v. Stumpf*, 23 Wis. 680; *People v. Kopplekow*, 16 Mich. 342; *Contested Elections of 1868*, 2 Brewst. 52; *In re Duffy*, 4 Brewst. 544; *Endlich on Statutes*, 618.

2. The provisions of § 10 of the act of 1874, are reasonable. They do not require any unreasonable accuracy or particularity. And it must not be overlooked that the requirement of an affidavit, in every instance, is due to the negligence of the voter in not causing his name to be registered. Those provisions are also necessary. The need of an efficient registry law is conclusively demonstrated by the opinions in *Page v. Allen*, 58 Pa. 338, and *Patterson v. Barlow*, 60 Pa. 54. If an unregistered person may vote upon filing an affidavit alleging in general terms that he possesses the constitutional qual-

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ifications, without specifying the particulars required by the statute, so as to enable the truth of the allegation to be tested and any perjury therein detected and punished, there are greater opportunities for fraudulent voting under the act of 1874 than there were under that of July 2, 1839, P. L. 519.

OPINION, MR. CHIEF JUSTICE PAXSON:

This case involves a number of interesting questions affecting the right of the citizen to vote at elections, the manner in which such right must be exercised, and the constitutionality of several provisions of the act of January 30, 1874, P. L. 31, entitled "A further supplement to the act regulating elections in this commonwealth."

The rights of the voter are clearly defined by § 1, article VIII. of the constitution, as follows:

"Every male citizen, twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections:

"First. He shall have been a citizen of the United States at least one month.

"Second. He shall have resided in the state one year, (or if, having previously been a qualified elector or native-born citizen of the state, he shall have removed therefrom and returned, then six months,) immediately preceding the election.

"Third. He shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election.

"Fourth. If twenty-two years of age, or upwards, he shall have paid within two years a state or county tax, which shall have been assessed at least two months, and paid at least one month, before the election."

The constitution having thus fixed the qualifications of voters, it is not in the power of the legislature to either enlarge or abridge them.

While the constitution has thus defined the rights of voters, it is silent in many respects as to how those rights shall be exercised. It prescribes very clearly the qualifications which a voter must possess, but it provides no machinery by which to ascertain whether a particular voter possesses such qualifications. All this has been wisely left to the legislature. It would be out of place in the fundamental law.

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Lightly as many persons appear to regard the right of citizenship, the history of the government fully bears out the assertion that the exercise of the elective franchise has been productive of a vast amount of fraud. And it is a kind of fraud that strikes at the integrity and imperils the existence of free government. This assertion is not made at random; we have judicial knowledge whereof we speak. Our books are full of cases where such fraud has been developed. In *Page v. Allen*, 58 Pa. 338, it was said by the late Mr. Justice READ: "I was counsel for Mr. Kneass in 1851, and of Mr. Mann in 1856, and from what I saw in those contested election cases I was fully convinced that the election laws were utterly insufficient in preventing fraud, and subsequent experience has confirmed me in my opinion. In some districts of the city—'plague-spots'—fraudulent voting is the rule, and honest voting the exception. I am fully convinced that nothing but a registry law, honestly and firmly administered, can cure an evil which strikes at the root of our republican institutions."

The legislature has from time to time passed various laws to regulate elections. Their object has always been to preserve the purity of the ballot. It is too late to question the constitutionality of such legislation, so long as it merely regulates the exercise of the elective franchise, and does not deny the franchise itself. Speaking of the registry act of 1869, it was said by Mr. Justice AGNEW, in *Patterson v. Barlow*, 60 Pa. 54:

"We come now to the important question whether the act of 17th of April last, called the registry law, is constitutional. It is admitted that the constitution cannot execute itself, and that the power to regulate elections is a legislative one which has always been exercised by the general assembly since the foundation of the government. The constitution appoints the time of the general election, prescribes the qualifications of voters and enjoins the ballot, and for all the rest the law must provide. The precincts and places, the boards of election, the lists of electors, whether called a list of taxables or a registry of voters, and the evidence of persons and qualifications, must all be prescribed by law. This undoubted legislative power is left by the constitution to a discretion unfettered by rule or proviso, save the single injunction 'that elections shall be free and equal.' But to whom are the elections free? They are

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free only to the qualified electors of the commonwealth. Clearly they are not free to the unqualified. There must be a means of distinguishing the qualified from the unqualified, and this can be done only by a tribunal to decide, and by evidence upon which a decision can be made. The constitution does not provide these; and therefore, the legislature must establish the tribunal and the means of ascertaining who are and who are not the qualified electors, and must designate the evidence which shall identify and prove to this tribunal the persons and qualifications of the electors."

I do not understand the foregoing to be disputed, but the appellant contends that the act of 1874, particularly the tenth section thereof, prescribes certain regulations, which, if they do not deny the right to vote, at least clog its exercise with such conditions as to render it unreasonably inconvenient. At the risk of being tedious, I give the said section in full:

"On the day of election any person whose name shall not appear on the registry of voters, and who claims the right to vote at said election, shall produce at least one qualified voter of the district as a witness to the residence of the claimant in the district in which he claims to be a voter, for the period of at least two months immediately preceding said election, which witness shall be sworn or affirmed and subscribe a written or partly written and partly printed affidavit to the facts stated by him, which affidavit shall define clearly where the residence is of the person so claiming to be a voter; and the person so claiming the right to vote shall also take and subscribe a written or partly written and partly printed affidavit, stating, to the best of his knowledge and belief, when and where he was born; that he has been a citizen of the United States for one month, and of the commonwealth of Pennsylvania; that he has resided in the commonwealth one year, or, if formerly a qualified elector or a native-born citizen thereof, and has removed therefrom and returned, that he has resided therein six months next preceding said election; that he has resided in the district in which he claims to be a voter for the period of at least two months immediately preceding said election; that he has not moved into the district for the purpose of voting therein; that he has, if twenty-two years of age or upwards, paid a state or county tax within two years, which was assessed at least two

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months and paid at least one month before the election. The said affidavit shall also state when and where the tax claimed to be paid by the affiant was assessed, and when and where and to whom paid; and the tax receipt therefor shall be produced for examination, unless the affiant shall state in his affidavit that it has been lost or destroyed, or that he never received any; and, if a naturalized citizen, shall also state when, where and by what court he was naturalized, and shall also produce his certificate of naturalization for examination. But if the person so claiming the right to vote shall take and subscribe an affidavit that he is a native-born citizen of the United States, or, if born elsewhere, shall state the fact in his affidavit, and shall produce evidence that he has been naturalized or that he is entitled to citizenship by reason of his father's naturalization, and shall further state in his affidavit that he is, at the time of making the affidavit, of the age of twenty-one years and under twenty-two years; that he has been a citizen of the United States one month, and has resided in the state one year; or, if a native-born citizen of the state and removed therefrom and returned, that he has resided therein six months next preceding said election, and in the election district two months immediately preceding such election, he shall be entitled to vote, although he shall not have paid taxes. The said affidavits of all persons making such claims, and the affidavits of the witnesses to their residence shall be preserved by the election board, and at the close of the election they shall be inclosed with the list of voters, tally-list and other papers required by law to be filed by the return judge with the prothonotary, and shall remain on file therewith in the prothonotary's office, subject to examination as other election papers are. If the election officers shall find that the applicant possesses all the legal qualifications of a voter he shall be permitted to vote, and his name shall be added to the list of taxables by the election officers, the word 'tax,' being added where the claimant claims to vote on tax, and the word 'age,' where he claims to vote on age; the same words being added by the clerks in each case, respectively, on the lists of persons voting at such election."

The preliminary question at once suggests itself, are these provisions mandatory, or merely directory? If the latter, the registry law is little better than a rope of sand, so far as the

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preservation of the purity of the ballot is concerned. That this court regarded such provisions as mandatory, when the case of *McDonough's Election*, 105 Pa. 488, was before it, is apparent from the opinion of Mr. Justice TRUNKEY. If we concede that the point was assumed rather than decided in that case, there was abundant reason and authority to sustain the assumption. "Where the words are affirmative," said Mr. Justice SHARSWOOD, in *Bladen v. Philadelphia*, 60 Pa. 464, "and relate to the manner in which power or jurisdiction, vested in a public officer or body, is to be exercised, and not to the limits of the power or jurisdiction itself, they may and often have been construed to be directory; but negative words, which go to the power or jurisdiction itself, have never, that I am aware of, been brought within that category." A clause is directory when the provisions contain mere matter of direction and no more; but not so when they are followed by words of positive prohibition: *Pearse v. Morrice*, 2 Ad. & E. 96. It was accordingly held, in the case first cited, that the fifth section of the act of April 21, 1858, P. L. 386, which declares that "no debt or contract, hereafter incurred or made, shall be binding upon the city of Philadelphia, unless authorized by law or ordinance, and an appropriation sufficient to pay the same be previously made by councils," were words of positive prohibition, and therefore mandatory. This ruling has been uniformly followed since.

It would be difficult to find language more positive or prohibitory than the act of 1874. It is negative in form. The third section declares: "No man shall be permitted to vote at the election on that day whose name is not on said list, unless he shall make proof of his right to vote as is hereinafter required." Moreover, it is highly penal in its character. The twelfth section provides that "if any election officer shall refuse or neglect to require such proof of the right of suffrage as is prescribed by this law, or the laws to which this is a supplement, from any person offering to vote whose name is not on the list of assessed voters, or whose right to vote is challenged by any qualified voter present, and shall admit such person to vote without requiring such proof, every person so offending shall, upon conviction, be guilty of a misdemeanor, and shall be sentenced for every such offence to pay a fine not

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exceeding five hundred dollars, or to undergo an imprisonment not more than one year, or both, at the discretion of the court." So much for the election officers who shall violate the provisions of the act. Section 17 is aimed at the voters themselves. It provides that "the respective assessors, inspectors and judges of the elections shall each have the power to administer oaths to any person claiming the right to be assessed, or the right of suffrage, or in regard to any other matter or thing required to be done or inquired into by any of said officers under this act; and any wilful false swearing by any person in relation to any matter or thing, concerning which they shall be lawfully interrogated by any of said officers or overseers, shall be perjury." In view of the positive prohibitions of the act, and the severe penalties by which the violators of its provisions are punished, there is nothing upon which to construct even a plausible argument that it is merely directory.

Before I proceed to discuss the details of the act, as developed by the respective assignments of error, these general rules for its construction may be stated with entire confidence:

(a) The primary object of the act is to prevent fraudulent voting. Hence, it must be so construed as to best carry out the intent of the legislature, and not to defeat it.

(b) The affidavit of the non-registered voter must be sufficiently specific as to show upon its face, without reference to any other fact or circumstance, that the voter has the right which he claims; and

(c) It must also be sufficiently specific to found thereon an indictment for perjury, in case any of the material allegations therein are wilfully false.

It is also proper to observe that the only objection that can be urged against the provisions of the act of 1874 is the argument *ab inconvenienti*, there being nothing which necessarily prevents a non-registered voter, who is otherwise qualified, from casting his ballot.

The first assignment of error raises the most important as well as comprehensive question in the cause. It is there alleged that the court below erred in "declining to allow the respondent's motion to strike from the examiner's report of illegal voters the names of all unregistered voters possessing certain qualifications, to wit, having filed affidavits covering

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the constitutional requirements of legal voters." The affidavits referred to in this assignment were substantially as follows:

First, that the voter was twenty-one years of age;

Second, that the voter had been a citizen of the United States at least one month, and had resided in the state of Pennsylvania one year immediately preceding November 6, 1888;

Third, that the voter had resided in the election district in which he voted for two months immediately preceding November 6, 1888;

Fourth, that the voter had paid a state or county tax within two years, which tax was assessed at least two months before November 6, 1888;

Fifth, that the said voter had not moved into the said district for the purpose of voting therein.

Connected with this affidavit was the affidavit of a witness, the particulars of which we need not specify, except as is hereinafter stated.

It needs but a glance at the above affidavit of the voter to see that it is a general affidavit embodying the language of the constitution, but omitting many of the specific matters required by the act of 1874. If it had been drawn for the purpose of enabling unqualified persons to vote, and to avoid the penalties prescribed by statute for illegal voting, it could not have been framed more adroitly. The act of 1874 substitutes for this loose kind of affidavit one of a more searching character. As before observed, it was intended to prevent fraud; and to this end, it probes the conscience of the voter by requiring him to state such specific facts as to enable the truth of his affidavit to be tested, and the proper punishment imposed upon him if it is false.

The affidavit in question fails to comply with the act of 1874 in the following particulars, *inter alia*:

(a) It does not state when and where the voter was born.

(b) It does not state when and where the tax claimed to be paid by the affiant was assessed, and where and to whom paid.

The affidavit of the witness does not comply with the statute in this, that it merely avers generally that the voter "has resided in the above-named election district for at least two months immediately preceding the sixth of November, 1888," instead of stating, as required by the act, "where the residence

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of the person so claiming to be a voter" was, in said election district.

It was urged on behalf of the appellant that at least some of these requirements are in excess of the legislative authority; that they are so stringent as in many instances to deprive the citizen of the right to vote, in disregard of the mandate of the constitution which declares that "no elector shall be deprived of the privilege of voting by reason of his name not being registered:" § 7, article VIII. By the word "elector" in this clause, is meant a duly qualified elector. When an elector has established his qualifications, in the manner pointed out by law, his vote must be received in obedience to the mandate of the constitution. Until, however, an unregistered voter has thus complied with the law, he is not even *prima facie* a qualified elector. We are unable to see anything in these requirements of the act of 1874, which, properly construed, are unreasonable, or in conflict with the constitution. It certainly imposes no hardship upon the voter to require him to swear, "to the best of his knowledge and belief, when and where he was born." There are few persons of sufficient intelligence to cast a ballot who have not some knowledge and belief of the time and place of their birth, and those who have neither knowledge nor belief can say so; the law does not require impossible things.

This brings us to the more serious objection that the affidavit does not state where and when the tax claimed to be paid by the affiant was assessed, and where and to whom paid. The force of the argument upon the act of 1874 was concentrated upon this one point. It was urged that it would often be impracticable, if not impossible, to give this information with precise accuracy, and that it is hard to be confronted with the loss of his vote on the one hand, and an indictment for perjury on the other. A reasonable compliance with the law does not subject him to either peril. The act was not intended as a trap in which to catch honest voters: it was passed to secure an honest, unbought, and unintimidated ballot; to prevent the lawfully-expressed will of the duly-qualified elector from being set aside by the corrupt practices which have in so many instances defeated the will of the people.

Is there any practical difficulty in the elector's stating when

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and where the tax was assessed, or when and where and to whom paid? A reasonable certainty in these matters is all that is required in the affidavit. As was well said by the learned judge of the court below: "It is not to be presumed that the tax-payer will be able to furnish the specific day and date of the assessment of his state or county tax, and it is unreasonable under ordinary circumstances to require him to do so. Identification of the tax is mainly what is sought for, and, when that is satisfied, it is sufficient. Taxes are identified by the year in which they are assessed, and the residence of the tax-payer in a certain locality in the county. These particulars are all that the statute, as we construe it, intends to require." And we quite agree with the learned court below, that the blanks in use, furnished according to the form prepared by the secretary of the commonwealth under the twenty-second section of the act, in so far as they require the voter to give the day and month as well as the year of the assessment, exceed the demand of the statute. It is sufficient if the tax is identified so that it may appear that its payment entitles him to vote, and that, if it is falsely stated, he may be indicted for perjury. Without such particularity, the affidavit is not of any use for any purpose. There may be instances, however, in which a specific day and date may be found necessary, as where the tax which the elector claims to have paid is a tax for the same year in which the election is held. In such case, a specific date may be found necessary to show that it was assessed at least two months prior to the day of election; but, as a general rule, the tax is sufficiently identified by giving the year in which it was assessed.

The voter must also state where the tax was assessed. Surely there is neither hardship nor inconvenience in this. The voter knows in what township, borough, or ward his property is situate, and in which it is assessed. It may be very convenient for the fraudulent voter to take a general affidavit that he has been assessed with a tax, wholly omitting the place where it was so assessed. In such case, there is nothing by which the accuracy of his statement can be conveniently tested, and a prosecution for perjury would be difficult. The duly qualified elector, who casts an honest ballot himself, and desires that others shall do the same, has no need to shelter himself behind a loose, vague affidavit.

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The act further requires that the affidavit shall state when, where, and to whom the tax was paid. What was said in regard to the assessment is applicable here. Convenient certainty only is required. If the voter has forgotten the name of the tax collector to whom he paid it, a statement that he paid it to the tax collector of the proper district, I apprehend, would be sufficient. If he does not remember the precise day, he can approximate it so as to show that it was within the proper time. If he has lost all recollection upon the subject, he must apply for information to the person to whom he paid it, or to the person who paid it for him. If he has lost his tax-receipt, and is unable to produce it for examination, he may make affidavit that he has lost it, or, if the fact be so, that he never received it.

Nor is it any hardship to the naturalized citizen to require him to state when, where, and by what court he was naturalized. They obtain the great privilege of American citizenship cheaply enough to justify their graceful submission to the laws of the country of their adoption. When the illustrious Paul asserted his right as a Roman citizen to be heard before he was condemned, the chief captain said to him, "With a great sum obtained I this freedom;" to which Paul replied, "But I was free born." We are more generous than was imperial Rome, and the citizenship for which she exacted a "great sum" we bestow freely upon all who ask for it.

As before remarked, the contention upon this point settles down to the argumentum ab inconvenienti. It may be that the careless voter who does not value his privilege sufficiently to see, as every one can see with very little trouble, that his name is placed upon the registry list, and who gives no thought to the means to establish his right to vote until he comes to the poll to deposit his ballot, may suffer some inconvenience, and in some instances lose his vote, not because he is not duly qualified, but for the reason that he has not the means of proof at hand to satisfy the tribunal which the law has appointed to hear his case. So, the litigant in a suit at law may be defeated though his case be never so good, if he fail to produce his evidence at the proper time. When an unregistered elector offers his vote at the poll, the law challenges it instantly, and he knows that he can only avoid the challenge by a strict compli-

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ance with the requirements of the statute. If he comes to the poll without his proof, it is his own folly and improvidence. He has no right to expect that his indifference to his rights, or indolence in asserting them, are to be condoned by nullifying the provisions of a law which is the main bulwark of the purity of the ballot, and which deprives no qualified elector of his right, except as the result of his own indifference to his duties as a citizen.

Other defects in the affidavit were pointed out by the learned judge below in his opinion, which we need not discuss at length. One was, that it does not state whether the voter was a native-born or a naturalized citizen, and, if the latter, when, where, and by what court naturalized, etc.; and another was that there is no jurat to the voter's affidavit, and the witness's affidavit or its jurat does not state that either of said affidavits were subscribed by the said voter. It is sufficient to say that the act, being mandatory, must be strictly complied with. The law, however, does not intend that a duly qualified elector should lose his vote for the negligence or misprision of an election officer. Hence, I apprehend that, when an affidavit has in point of fact been made in compliance with the act, and the informality is the result of the ignorance or neglect of the officer before whom it was taken, such defect could be cured and the paper reformed, upon due proof of what occurred at the time.

The second assignment alleges that the court erred in declaring certain votes to be illegal, on request of contestants, in election districts not mentioned in contestants' petition. As I understand the case, this point arose in the following manner: In their petition, the contestants specified certain districts, in the county, in which they alleged frauds were committed, and, of course, were confined in their testimony to those particular districts. But the respondent, in his answer, alleged that illegal votes had been received and counted in every election district in the county. This put the whole county in issue, and he was correspondingly unlimited in his proofs. The whole body of election records and returns of the general election of 1888, and the corresponding registry lists, were put in evidence by him. He now seeks to utilize so much of this evidence as will serve his turn, and reject the remainder. This

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proposition does not require discussion. "It would be an unheard of course of proceeding," said the learned judge below, "in a court supposed to be organized for the administration of justice, to hold, as we are now moved to do, that the evidence put in by one party could be utilized by himself so far as it suited him, but could not be used against him to his disadvantage, if any part of it happened to present that aspect."

The third assignment alleges that "the court erred in declining to permit certain election officers to come in and sign the jurats of the affidavits of certain voters and witnesses upon request made therefor, where it appeared by a clerical omission said jurats were not signed by said election officers at the time of the election." I have already intimated that an affidavit which is merely defective from the absence of the jurat, may be reformed upon due proof that it was properly made before the proper officer. Such a principle was recognized in *Pottsville Bor. v. Curry*, 32 Pa. 443. It was there said by Mr. Justice STRONG: "A party is not to lose his right to trial by jury through the mistake or omission of the officer of the law. Here the oath required by the act of assembly had actually been made, and it had been reduced to writing. The attestation by the prothonotary, only, was omitted. The appellants had done all that the law required to obtain the appeal, and could not be affected by the failure of the prothonotary to discharge his duty." It is true, this occurred in a civil suit in the Common Pleas, but the decision applies with equal force to an election contest. Why should the elector lose his vote because of the neglect of the officer of the law in attaching the jurat? Such mistake may not only be innocent, but is likely to occur at a crowded poll, particularly in view of the fact that the election officers, in many instances, are without experience. I notice that this principle has been applied by the lower courts to election cases in some instances: See *McCann v. Shonk*, 4 Luz. L. Reg. 91; *Griffith's Case*, 9 Luz. L. Reg. 211. While the learned court below were not agreed upon the law as applicable to this motion, they refused it because it was not sustained by the evidence. There was nothing before the court upon which the affidavits could have been reformed. The evidence was general and vague in its character, and not confined to specific affidavits. The voters who took and subscribed the affidavits

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were not called. The affidavits could not be reformed by wholesale. Each separate paper required its independent proof. We cannot say the court below erred in refusing this motion.

The fourth, fifth, sixth, and seventh assignments are sufficiently covered by what has already been said. None of them is sustained. The eighth and last assignment is the formal one that the court erred in its decree that John H. Thomas was duly elected to the office of clerk of the courts of Lackawanna county. This does not require discussion. We see no reason to interfere with the action of the court below.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

P. S. DUNCAN ET AL. v. H. & G. IRON WORKS.

APPEAL BY PLAINTIFFS FROM THE COURT OF COMMON PLEAS OF BLAIR COUNTY.

Argued April 24, 1890—Decided October 6, 1890.

Where, on a bill filed to enjoin the defendant from the further mining of ore and for an account, it is disclosed that the legal right of the defendant to do the acts complained of is the controlling question in the case, and depends upon the construction of the will of a former owner under which both parties claim title, and all right in the defendant under said will is wholly denied by the plaintiff, it is not error to dismiss the bill for want of jurisdiction: *North Penn. Coal Co. v. Snowden*, 42 Pa. 488; *Grubb's App.*, 90 Pa. 229; *Ferguson's App.*, 117 Pa. 426.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS and MITCHELL, JJ.

No. 106 January Term 1890, Sup. Ct.; court below, No. 90, Eq. D., C. P.

In the court below, Peter S. Duncan, Sarah F. Duncan and John W. Duncan filed their bill in equity against the Hollidaysburg & Gap Iron Works, showing their title to certain ore lands under the will of Peter Shoenberger, who died in 1854, and, averring that the defendants were "constantly, continuously

136	478
170	271
136	478
193	644
136	478
204	366
136	478
e 30 SC	362
136	478
224	68

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and daily "trespassing upon said lands and taking ore therefrom, prayed: 1. For discovery of the defendants' title. 2. For an injunction. 3. For "an account, which would be such an account as would depend upon the construction of the rights of the defendants; being total, if the court are of opinion that the defendants possess no rights in complainants' property; or partial, if the court are of opinion that although such right existed the supply taken was excessive." The provisions of the will of Peter Shoenberger, deceased, the averments of the bill and of the answers filed, sufficiently appear in the opinion of the Supreme Court.

Issue having been joined, the cause was referred to *Mr. H. M. Baldridge*, as examiner and master, who subsequently reported in part as follows:

The principal subject of contention arises upon the construction of the last will and testament of Dr. Peter Shoenberger, under whom both parties claim, and relates to the ore rights or privileges pertaining to what is known as the Bloomfield Furnace Mines.

Dr. Shoenberger, in his lifetime, was extensively engaged in the iron business, and owned large and valuable properties, including rolling-mills, furnaces, forges, ore-banks, etc. Among his properties were Bloomfield Furnace, Sarah Furnace, Rebecca Furnace, Gap Furnace and Forge, and a large body of valuable iron-ore deposits known as the Bloomfield Mines. Dr. Shoenberger died in June, 1854, leaving a will dated June 14, 1852, with six codicils thereto, the last of which was dated May 11, 1854, and which will and codicils were duly admitted to probate in Philadelphia on the 28th and 29th of June, 1854. By the seventh clause of his said will he devised unto his daughter Martha Duncan during her natural life, inter alia, Bloomfield Furnace, with all the lands and tenements thereto belonging in a schedule therein mentioned, and, also, generally, all other lands which he might in his lifetime purchase for and attach to said Bloomfield Furnace, although not specifically named, and in said devise made the following reservation:

"And further reserving and excepting any such lands that may be otherwise devised herein, and the right and privilege hereinbefore and hereinafter devised to the owners of Rebecca

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Furnace, Sarah Furnace, and Gap Furnace, for to mine and take away iron ore from any of the afore-mentioned or described lands enough to supply one furnace at Rebecca, one furnace at Sarah, and one furnace at Gap Works. But the said right and privilege is not to be so exercised as to interfere with the operations of said Bloomfield Furnace and the Maria Forges; and I do hereby reserve the right and privilege to the owners of Sarah Furnace to make all such railroads or common roads through or over said Bloomfield Furnace lands (having reference to the best location of such roads, in doing as little violence and injury to said Bloomfield Furnace lands and property as possible) as shall be necessary to enable the owners of Sarah Furnace to convey their iron ore from the mine banks to said furnace;" And at her death he devised said lands, etc., unto her surviving children as tenants in common, and "as purchasers, and not by descent."

Mrs. Martha Duncan died March 28, 1863, leaving surviving her her husband, John W. Duncan, and three children, viz., Peter S. Duncan, John Collins Duncan, and Sarah F. Duncan. John Collins Duncan died September 1, 1878, intestate, unmarried, without issue, and leaving to survive him his father John W. Duncan, and his brother Peter S. Duncan, and sister Sarah F. Duncan. The said John W. Duncan having died since the closing of the testimony in this case, the whole title to the Bloomfield Furnace property becomes vested in Peter S. Duncan and Sarah F. Duncan, who with John W. Duncan were the complainants in this bill.

The respondents are the present owners of the Gap Furnace property, which at one time belonged also to Dr. P. Shoenberger. . . .

—The master then traced the title to the Gap Furnace property, from Peter Shoenberger through the Juniata Iron Manufacturing Co., and others, into the defendants; and, having stated the grounds upon which the plaintiffs claimed in their bill to be entitled to the relief prayed for, proceeded:

And the learned counsel of complainants in their arguments before the master did not abandon any of these positions. They denied that the defendants had any rights whatever in the premises. They claimed that under the will of Dr. Shoenberger there was no express devise of an ore privilege to Gap

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Furnace; that, while by the seventh clause or item in the will, Dr. Shoenberger reserved and excepted in the devise of Bloomfield Furnace to Mrs. Duncan and her children, "the right and privilege hereinbefore and hereinafter devised to the owners of Rebecca Furnace, Sarah Furnace, and Gap Furnace," yet in the fourth and fifth items of the will no ore rights were given to the devisees, and there was no hereinafter devise to Gap Furnace; and that the conveyance between the date of his will and the last codicil was a revocation of the devise. They further urged that there was no implied right or privilege under the reservation in the seventh clause of the will, and that, if there was, it was personal to the McCormicks, to whom Gap Furnace was first devised; and that if it could be held that there was some sort of an implied right which in some manner passed by subsequent devise, then such subsequent devise would merely vest the personal right in E. F. Shoenberger, and would not pass to his vendee. And in the amended bill the prayer is, "And if it be decreed that the defendants have any rights whatever in the premises, then in the alternative," &c. The complainants, therefore, denying that the defendants have any rights whatever in the premises, has the equity side of the court jurisdiction of the matter in controversy? The master is of the opinion it has not.

The questions are purely legal, and depend entirely on the construction to be placed on the will of Dr. Shoenberger. Courts of equity will interfere by injunction to protect the clear rights of suitors, but not when they are uncertain, doubtful, or disputed, and depend on the legal construction of deeds, etc. The Supreme Court, in Grubb's App., 90 Pa. 228, say that the proper construction of a deed is a legal question, and is not the subject of equity jurisdiction. On the same principle, equity has not jurisdiction where the title depends on the construction of a will. The reason for the rule is the same. The same case rules that "a bill in equity is not a panacea;" it was never intended nor has it ever been used to settle disputed rights in trespass; that where the right is clear it will restrain the commission of repeated acts of trespass, on the sole ground of preventing a multiplication of suits.

Here the plaintiffs charge the defendants to be trespassers, having no rights in the premises; while the defendants claim

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they have a clear right, exercised and recognized for years. In *North Penna. Coal Co. v. Snowden*, 42 Pa. 488, it was held that while it may be admitted that a bill will lie by one tenant in common to restrain waste or procure partition, yet even in such cases, confessedly within the jurisdiction of a court of equity, such a court would not interfere if complainant's title be denied, without he has vindicated it at law; that, to obtain an injunction the plaintiff's right must be acknowledged or established; that, where the title is legal, the case is not within the jurisdiction of a court of equity. There, no tenancy in common was charged, and the bill, as in this case, as the gravamen of complaint denied the defendant's title.

In *Long's App.*, 92 Pa. 179, it was ruled that when an account prayed for is but incidental to and dependent upon the determination of the title, the title must first be settled in favor of the plaintiff or he can have no account. An injunction will never be granted except in a clear case; never, when the whole title is in dispute; nor, unless the plaintiff is without an adequate legal remedy. If the defendants have no rights, they are trespassers and plaintiffs have a complete remedy. If suit were brought by plaintiffs for damages and a recovery were had, no doubt the defendants would desist their mining operation; or, if not, after the title should thus be established then injunction would lie; but, until plaintiffs' exclusive rights are acknowledged or established, we are of opinion an injunction would not be allowed.

The plaintiffs claim that this is not an ejectment bill, as claimed by defendants, because they as well as the defendants are in possession, and therefore it is unlike the case of *Tillmes v. Marsh*, 67 Pa. 507, cited by defendants. We are inclined to the opinion that ejectment would lie, if plaintiffs were entitled to the exclusive possession, and they were deprived of this by reason of the joint possession of the defendants. But, however this may be, an action of trespass would be an adequate legal remedy, if the defendants have no rights in the premises.

Plaintiffs further reply that the court has jurisdiction, because the bill is one for discovery of defendants' title and is in the alternative; and in the fourteenth paragraph of the bill they pray "that should said will be otherwise construed, and should the court be of the opinion that under and by virtue of said

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last will and codicils a right and privilege to mine and take away ore from the complainant's lands were owned and possessed by said Ed. F. Shoenberger and in such wise as to inure to the benefit of his vendees, and if it should be made to appear that these defendants are the lawful successors to and owners of said right and privilege, yet the claims and acts of said defendants in mining and carrying away iron ore in quantities largely in excess of what would be sufficient to supply and furnish one furnace of the size and capacity of said Gap Furnace, as described and referred to by said testator in his said last will and testament, are contrary to equity and good conscience." They cite Wilhelm's App., 79 Pa. 120, and especially that part of the opinion where the Supreme Court say "that a bill containing a prayer framed with a double aspect forms no objection to it."

The rule has been accurately stated by Lord HATHERLY in *Rawlings v. Lambert*, 1 Johns. & Hem. 466: "You have no right to allege two inconsistent states of fact, and ask relief in the alternative, for the two cannot be true; but you have always a right to state the facts of the case, the documents, and deeds, and ask the conclusion of the court on those facts and documents, and say the court may come to one conclusion of law, or it may come to another. And you may ask the court to come to a conclusion on the facts you have disclosed, having stated everything that will enable the court to form a proper judgment; you may ask the judgment of the court on two alternatives."

Plaintiffs, of course, would be entitled to file a bill for a discovery of title, but the answer fully disclosed that. That part of the bill is but incidental; and so as to the prayer for an account, as there is no dispute as to the quantity of ore mined. The real object of the bill is undoubtedly to establish the rights of the parties. Can suitors, by the introduction of incidental matters, about which there is no dispute, by framing a bill in the alternative give jurisdiction to disputed questions of title? There is no doubt that, when the court has jurisdiction as to part of the property, the entire subject will be adjudicated, even if an action of ejectment would be an adequate remedy for a part, as was ruled in *Socher's App.*, 104 Pa. 609. And, if plaintiffs conceded that the defendants had any rights under

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the will of Dr. Shoenberger, but contended that they were limited in their rights to a sufficient quantity of ore for the supply of one furnace, of the capacity at the time of the reservation in the will, then the case would be very similar to Alden's App., 93 Pa. 182, and we would have no doubt as to the jurisdiction.

But Wilhelm's Appeal, so much relied on by the plaintiffs, is entirely different in its circumstances. That was a bill praying for an account of ores taken from a tenancy in common, setting forth title, &c. Afterwards, the bill was amended by charging that ores had been taken outside the limits of what had been described as the common property in the original bill, and contained a prayer in the alternative, asking an account co-extensive with what the court should decide, from the title set forth, to be the tenancy in common. In the opinion, the court say: "Nor is there any doubt that, though a question of title may be necessarily involved, it is within the jurisdiction; for, where there is jurisdiction of the subject matter, that carries with it the jurisdiction to decide every incidental question that is necessarily involved." "If, upon a bill for an account between tenants in common, a question arise as to the extent of the land comprised in the title, surely it must be competent for the court to determine it in order to make an end of the controversy." In Allison's App., 77 Pa. 221, also cited by plaintiffs, the court say, "as a general principle, where the court has obtained jurisdiction for one purpose, it may retain it for general relief." Sheetz's App., 35 Pa. 88; Unangst's App., 55 Pa. 128; Gass's App., 73 Pa. 39; Carty's App., 5 W. N. 241; and numerous other authorities were cited by plaintiffs, but in our judgment they are not analogous cases. None of them conflict with the rule as laid down in North Penna. Coal Co. v. Snowden, 42 Pa. 488; Long's App., 92 Pa. 171; Tillmes v. Marsh, 67 Pa. 507; and most of them are referred to in argument of counsel in Grubb's App., 90 Pa. 228, which, we think, rules this case.

We think the defendants should have demurred to the bill, and the question has been suggested whether the defendants are not too late, after an answer to the bill on its merits, to raise the question of jurisdiction; but Mr. Justice PAXSON, in Grubb's Appeal, says that all orders and decrees in equity, where there is no jurisdiction, are simply coram non judice, and that the Supreme Court had, on its own motion, dismissed

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a bill for this reason. As the question can be raised at any time, and the defendants have raised it on the argument, and our opinion being that it is well taken, we can do nothing more than suggest the dismissal of the bill at the costs of complainants.

To the foregoing report, the plaintiffs filed exceptions alleging that the master erred in not reporting that the plaintiffs were entitled to relief under the pleadings and evidence, and in recommending the dismissal of the plaintiffs' bill. These exceptions were overruled by the master and renewed on the filing of his report. After argument thereof before FURST, P. J., 49th district, holding special term, they were dismissed, the master's report confirmed, and a final decree entered dismissing the plaintiffs' bill at the costs of the plaintiffs. Thereupon the plaintiffs took this appeal, specifying the dismissal of their exceptions and the decree dismissing their bill, for error.

Mr. A. T. Freedley (with him *Mr. B. L. Hewit*), for the appellants.

Other than cases considered by the master, counsel cited: *Bitting's App.*, 105 Pa. 521; *Washburn's App.*, 105 Pa. 483; *Ferguson's App.*, 117 Pa. 426; *Earley's App.*, 121 Pa. 496; *Brush Elec. Co.'s App.*, 114 Pa. 574; *Bierbower's App.*, 107 Pa. 14; *Sterling's App.*, 111 Pa. 41; *Andriessen's App.*, 123 Pa. 328; *Oil Well Packer Co.'s App.*, 128 Pa. 421.

Mr. S. S. Blair and *Mr. Aug. S. Landis*, for the appellee.

Other than cases considered by the master, counsel cited: *Drove Yard Co.'s App.*, 123 Pa. 250; *Penna. R. Co.'s App.*, 125 Pa. 208.

OPINION, MR. JUSTICE STERRETT:

The bill sets forth, inter alia, that Dr. Peter Shoenberger died in 1854, having by his last will and testament devised certain lands called Bloomfield, and other lands adjacent thereto, to his daughter Martha Duncan for the term of her natural life, and, upon her decease, to her surviving children as tenants in common, reserving and excepting "the right and privilege hereinbefore and hereinafter devised to the owners of

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Rebecca Furnace, Sarah Furnace, and Gap Furnace, for to mine and take away iron ore from any of the afore-mentioned or described lands enough to supply one furnace at Rebecca, one furnace at Sarah, and one furnace at Gap works; but the said right and privilege is not to be so exercised as to interfere with the operations of said Bloomfield Furnace and Maria Forges."

That, while the right and privilege aforesaid is devised to the owners of Rebecca Furnace and Sarah Furnace, no such right is devised in any part of said will to the owners of Gap Furnace. That by the first and fifth codicils to his will the testator devised Gap Forge and Furnace to trustees for Edwin F. Shoenberger, whose title the defendants claim that they acquired by certain conveyances unknown to the plaintiffs. That the defendants are constantly, continuously, and daily trespassing on complainants' lands, pretending that they have a right to do so under the above-recited provision in the devise of Bloomfield to these complainants, and that they further claim a right to take away iron ore sufficient to supply not only the Gap Furnace, which existed at the time of testator's devise, but an entirely new furnace which they have erected, requiring five times as much iron ore as the former one. That the claims of the defendants are without foundation; for, if any such right or privilege was devised in any way, it was devised to testator's daughter, Sarah McCormick, and not to Edwin F. Shoenberger, the defendants' predecessor in title; and that, even if otherwise, the said right was personal in said Edwin F. Shoenberger, and, if any right existed, the amounts of ore taken were wholly inordinate and excessive. The prayers of the bill are, 1. for discovery of defendants' title; 2. for an injunction; and 3. for an account corresponding with the rights of the defendants, if any they have, as the same may be determined by the court. The amended bill avers that if the defendants have any rights at all in the premises, they must, under the express terms of the devise, be exercised in such manner as not to interfere with complainants' works and the operation of their mines, etc.

In their answers, the defendants aver that by divers conveyances the right and title to Gap Forge and Furnace became vested in them; that, by his last will and testament, Dr. Shoenberger devised to the owners of Gap Furnace, and as

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appurtenant thereto, the right to take iron ore from Bloomfield mines sufficient to supply one furnace at Gap; that the right to take ore, as aforesaid, from Bloomfield mines, as an appurtenant of Gap Furnace, has always been recognized, and was never questioned until the same was denied by the plaintiffs in their bill. The defendants also deny that they are restricted in the quantity of ore to be taken from Bloomfield, to the size and capacity of the original structure of Gap Furnace.

It appears from the record that the claim of the defendants to mine and take ore from the Bloomfield lands is grounded on their alleged legal right to do so. That right is not only expressly denied by the plaintiffs, but they also deny that the defendants have any title to the Gap Furnace and Forge, and call upon them to set out in their answer an abstract of their title. The legal right of the defendants to do the acts complained of, was thus the controlling question in the case. In view of that, the learned master rightly held that the plaintiffs had mistaken their remedy, and in a clear and exhaustive opinion, fully sustained by reason as well as authority, he recommended that the bill be dismissed. Exceptions to his report were overruled by the court, and the bill was dismissed.

The familiar principle recognized in the cases cited by the learned master and court below is, that, where the case hinges upon a disputed legal title, that title must be first settled in an action at law. As was said in *North Penna. Coal Co. v. Snowden*, 42 Pa. 488: "The right of the plaintiff must be acknowledged, or established at law, before he can resort to a chancellor." In *Grubb's App.*, 90 Pa. 229, the right of a party to take ore from the land of another was disputed, and depended on the construction of a deed, etc. The bill for an account was dismissed, on the ground that the question was a legal one, properly belonging to a court of law. Again, in *Ferguson's App.*, 117 Pa. 426, the principle is thus stated by the present Chief Justice: "Where rights which are legal are asserted on one side and denied on the other, the remedies are at law. They cannot be settled under equity forms."

It is not our purpose to elaborate the principle on which the court acted in adopting the recommendation of the master and dismissing the bill. That has been sufficiently done in the re-

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port of the learned master, and in the opinion of the court below.

Decree affirmed, and appeal dismissed, at the costs of appellants.

KATH. SHADLER ET AL. v. BLAIR COUNTY.

APPEAL BY PLAINTIFFS FROM THE COURT OF COMMON PLEAS
OF BLAIR COUNTY.

Argued April 25, 1890—Decided October 6, 1890.

[To be reported.]

(a) The act of April 12, 1843, P. L. 221, imposes upon the commissioners of the counties of the commonwealth the duty of keeping county bridges in repair. That act, as to Huntingdon county, was repealed by the act of March 11, 1844, P. L. 86. By the act of February 26, 1846, P. L. 64, Blair county was erected out of parts of Huntingdon and Bedford counties:

1. By the act creating Blair county, providing that the officers of said county should be subject to "the same duties as other similar officers" in the other counties of the state, it became the duty of the county commissioners, under the general law, to keep in repair county bridges erected prior to 1846, in territory taken from Huntingdon county.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS
and MITCHELL, JJ.

No. 360 January Term 1890, Sup. Ct.; court below, No. 186
January Term 1888, C. P.

On December 12, 1887, Katharine Shadler and David Shadler, by his guardian, D. Moyer, brought trespass against the county of Blair, to recover damages for the death of Henry Shadler, husband of said Katharine and father of said David Shadler, alleged to have been caused by the negligence of the defendant. The defendant's plea was not guilty.

At the trial on January 27, 1890, the following facts were shown:

Henry Shadler was the owner of a steam threshing machine,

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and carried on the business of threshing grain for farmers residing in the vicinity of Williamsburg, Blair county. The thresher was moved as well as operated by a traction engine. On November 16, 1887, Shadler started to take the traction engine, without the separator, over the Juniata river by way of a bridge at Williamsburg. When the engine, after going upon the bridge, had proceeded about twenty feet, the structure gave way and the engine and boiler were thrown into the river; Shadler was killed, and his assistant, John Kipe, was injured.

The bridge in question, partly in Woodbury township and partly in Catharine township, the river being the dividing line between the two, was about 180 feet in length. It was originally built by the county of Huntingdon in 1838 and 1839, the townships named being a part of that county at that date, and was of record as a county bridge. By the act of March 11, 1844, P. L. 86, Huntingdon county was excepted out of the operation of the act of April 13, 1843, imposing upon counties the duties of keeping county bridges in repair. Blair county was formed out of parts of Huntingdon and Bedford counties by the act of February 26, 1846, P. L. 64, the townships of Woodbury and Catharine being embraced in that part of Huntingdon county which was thus incorporated into Blair county. In 1871, and again in 1881, Blair county repaired this bridge. There was no evidence that the townships ever made any repairs upon it.

Testimony for the plaintiffs tended to prove that the bridge was in a bad state of repair, the sills and other important timbers, which had never been replaced since its original construction, being very much decayed from dry rot; that an ordinary inspection would have disclosed that defect, although to outward appearance the timbers remained sound; that ordinary care, in the case of an old bridge like this one, would require an inspection once in every three to five years, and that there was no inspection of it made after 1881, and no sufficient or proper inspection was then made. There was testimony on both sides, upon the question whether the use that Shadler was making of the bridge imposed upon it an extraordinary and unusual strain.

At the close of the testimony, the court, DEAN, P. J., charged

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the jury, submitting to them the questions whether the county commissioners had exercised ordinary care to ascertain the condition of the bridge and make such repairs as would render it reasonably safe for the use of the traveling public; whether the use to which Shadler put it imposed upon the bridge an extraordinary or unusual weight, producing an extraordinary or unusual strain upon the timbers; whether it would have been safe to ordinary travel, and whether or not Shadler was guilty of contributory negligence; and refused a point asking for binding instructions in favor of the defendant, reserving for subsequent consideration, with the right to enter judgment, non obstante veredicto, should there be a verdict for the plaintiffs, the following point submitted by the defendant:

7. The bridge, on which the alleged accident took place, being in a part of Huntingdon county which was separated therefrom in 1846 to form the county of Blair, and the act of April 13, 1843, imposing on counties the liability to repair county bridges, having been repealed as to Huntingdon county by the act of March 11, 1844, there can be no recovery in this case, and the verdict must be for the defendant.

The verdict of the jury was in favor of the plaintiffs for \$2,000. After argument, the court, DEAN, P. J., made absolute a rule for judgment for the defendant, non obstante veredicto, filing an opinion which, after reciting the facts and the point reserved, proceeded as follows:

As a general rule, bridges are to be maintained by the same parties as maintain the roads and highways. This was the law in this state up until the passage of the act of April 13, 1843, which is as follows: "It shall be the duty of the county commissioners of the several counties of the commonwealth, to repair all bridges erected by the county, and to pay the expenses of such repairs out of the county treasury in the usual manner." Five counties were excepted from the operation of this act, in the original bill. On March 11, 1844, Huntingdon county was excepted. This simply relegated the county to its common-law liability. The defendant alleges, that the exception has the effect of a local act, covering the territory of Huntingdon county, which remains in force as to all parts of that territory until expressly repealed.

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The first case bearing on the question is Camack's Road Case, 1 Bro. 164, which was this: The general act of April 6, 1802, authorized the laying out of all roads in the state, by six viewers appointed by the Court of Quarter Sessions. By act of April 8, 1804, it was enacted that in the township of Northern Liberties and district of Southwark twelve viewers should be appointed to lay out roads in this territory, neither of whom should be owners of real estate in the district. In 1807, under the general law of 1803, authorizing the formation of new townships, the township of Penn was created, embracing within its boundaries the territory of Northern Liberties. In 1810, a petition was presented to the court, under the special law, for a continuation of a road called Camack's road in Penn township, and the court appointed twelve viewers, as provided in the special act of 1804, who reported in favor of the road. A motion was then made to quash the whole proceeding, on the ground that the creation of the new township of Penn subjected all the territory, embraced within its limits, to the provisions of the general road law of the state, and made the special law of the Northern Liberties inoperative as to that portion of its territory included in Penn. The court ruled that the formation of the new township, under the general law, left the local law undisturbed, and refused the motion to quash. The reason given for the decision is, that, the local law being a legislative enactment, a general law passed afterwards, authorizing the courts to erect new townships, neither repealed nor gave the courts power to abrogate local laws in force on territory out of which new townships were formed; the legislature alone, by express enactment had the power.

This was a judgment of the Common Pleas of the first district, as the courts were at that time organized, but the decision is afterwards cited with approval by the Supreme Court in Clifford v. Belstering, 2 S. & R. 107, a case decided in 1815. The court, in deciding substantially the same question, say: "This was decided in the Court of Common Pleas, in the case of Camack's Road, where the principle was fully discussed and the opinion of the court delivered at large with very satisfactory reasons."

In Parsons v. Winslow, 1 Gr. 160, the county of Elk was formed out of parts of Jefferson, Clearfield and McKean, in

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each of which a special mechanics' lien law was in force at the time of the division, but the law had not been extended specifically to Elk, when the lien in dispute was filed. It was argued that the law extended only over the territorial limits of the counties named in it; that when territory was taken from them and made into a new county, the law applicable to the other counties was not operative in a new county by another name. The Supreme Court say: "Territory or men, once made the objects of legislation, remain subject to the laws imposed, however names by which they are designated may be changed."

In *Lackawanna Co. v. Stevens*, 105 Pa. 465, Lackawanna county had been formed out of part of Luzerne in August, 1878, and a special act fixing fees of sheriffs in Luzerne county had been passed in 1873. The question was, whether the division of the territory in 1878 had the effect of repealing the special act of 1873 as to Lackawanna county. The Supreme Court say: "Did the subsequent formation of the county of Lackawanna, out of a portion of the territory, operate as a repeal thereof (the special act) in the new county? We think not. The act providing for the formation of the county did not repeal any of the special laws then in force. Although the name of the municipality which covered this portion of the territory was changed, yet the effect thereof was not by implication to repeal any local laws then in force within its boundaries."

The principle of these and all the cases I have examined is, that the repeal of a special law will not be implied, simply because a portion of the territory of an old county or township has been cut off and made into a new one; to repeal, there must be an express enactment.

I admit, the law, in the cases cited, is based on a state of facts differing somewhat from those in the case before me. In all the cases mentioned, the old municipality had been made subject to the provisions of an affirmative, special statute, irrevocable by implication and not repealed by expression. Here, the county of Huntingdon, after being subject one year to a general law, is excepted from its provisions. It is not the case, exactly, of a locality subject to a special law, but of one excepted from the operation of a general law. This left it to its common-law liability; unless that, under the circumstances, be

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treated as equivalent to a special statutory liability, there was no special law to repeal.

In this view, it is argued, that express repealing words were not necessary to subject the new county to the general laws of the state, for that subjection necessarily followed from the very act of creation; that by that act the county became subject to the general bridge law, just as it became subject to the general judicial, tax, and road laws of the commonwealth; that the enacting clause of the act of 1846, after naming the townships to be severed from Huntingdon and Bedford, says: "They are hereby erected into a new and separate county to be called Blair, and the inhabitants thereof shall from the fourth Monday of July next, have all such courts, jurisdictions and privileges as the inhabitants of the other counties of the commonwealth are or may be entitled to;" that, there being no affirmative special statute in force in Huntingdon to be repealed, under the words of this enactment the general bridge law at once fastened its provisions on the new county and it became subject to it; that, taking the territory from the county excepted, took it out of the exception and put it under the operation of the general rule.

While I have considered this view of the question, it is not of sufficient weight to warrant me in saying that the principle laid down in the authorities cited, is not applicable to the facts in this case. Reasons for denying the point, drawn from the confusion which must follow from the existence of a different liability in different sections of the county, and the tendency of the courts of later years to promote harmony, by construing laws as having a general operation rather than a local one, must be addressed to the court having the power to change the decisions which declare the law in this case.

Nor do I think the fact, that the county occasionally repaired this bridge estops it from denying now that it was its duty to repair; such acts cannot create a statutory liability, if none existed. Nor do I think that the peculiar phraseology of the act of 1846, establishing Blair county, wherein the rights and privileges of the inhabitants thereof, and the duties of county officers are specified as being the same as those of the other counties of the commonwealth, is sufficient to warrant us in saying that the exception is not in force in the new county. As the law stands, in my opinion it is with the defendant.

Arguments.

Let judgment be entered for defendant notwithstanding the verdict for plaintiffs.

—Thereupon, the plaintiffs took this appeal specifying that the court erred:

5. In entering judgment for the defendant, on the reserved question, non obstante veredicto.

Mr. H. M. Baldridge, for the appellants:

1. The cases cited by the court below in support of its opinion, do not rule that under all circumstances new counties are to be governed by the local laws of the counties from which they were taken, rather than by the general laws of the commonwealth. Those cases were decided in view of the special circumstances surrounding them, and were not intended to enunciate a general principle, regardless of all circumstances. Even if they sustain the proposition in support of which they are cited, they do not control this case, as there was no special law applicable to Huntingdon county when Blair was taken from it. The act of April 13, 1843, P. L. 221, had simply been repealed as to Huntingdon. When Blair was erected, did not that act apply to it? If not, it must be governed by some other law, statutory or common.

2. In Pennsylvania the duty to repair bridges is statutory: *Rapho v. Moore*, 68 Pa. 406. Prior to the act of 1843, the duty of building and maintaining bridges was regulated by the act of June 13, 1836, P. L. 555. Its 35th section directs when bridges shall be built at the county expense, but it is silent as to their repair. By implication, the obligation to build carries with it the duty to repair: *Phoenixville v. Iron Co.*, 45 Pa. 140. See also *Meadville v. Canal Co.*, 18 Pa. 68. But, as there was no special law in Huntingdon when Blair was formed, the act of 1846, erecting the latter county, which imposes on its officers the same duties as those of similar officers in other counties, brings the county under the general act of 1843. Blair county has always recognized its obligation to maintain this bridge. All repairs to it have been made by the county, and the townships have never repaired it. The county's long-continued recognition of this obligation is sufficient to determine its liability: *Meadville v. Canal Co.*, *supra*.

Arguments.

Mr. W. I. Woodcock and *Mr. Martin Bell, Jr.*, for the appellee :

1. Prior to the act of April 13, 1843, P. L. 221, the duty of maintaining bridges rested on the townships · *Erie Co. v. Commonwealth*, 127 Pa. 207. The act of March 11, 1844, P. L. 86, which repealed the act of 1843 as to Huntingdon county, was special or local in its nature, and therefore territorial in its application. Accordingly, when the territory on which the bridge stood was taken from Huntingdon county in 1846, it came into the new county of Blair stamped with said local law which imposed the burden of repairing county bridges on the townships. On this question we refer to the authorities cited by the court below, and to the latest case we can find on the subject, *South Abington Tp. Road*, 109 Pa. 120.

2. The attempt to distinguish the act of 1844 from an ordinary local law, is without force. By it Huntingdon county was made subject to a rule of its own, not governing the state at large; and it is immaterial whether this result was effected by an enactment in positive terms or by the partial repeal of a general law. The act of February 26, 1846, erecting the county of Blair, contains no positive words repealing local acts governing any part of the territory, and without positive words no such repeal is to be implied: *Sifred v. Commonwealth*, 104 Pa. 181; *Morrison v. Fayette Co.*, 127 Pa. 110; *Brown v. Commissioners*, 21 Pa. 43; *Malloy v. Commonwealth*, 115 Pa. 25.

3. The fact that the county commissioners in 1871 and 1881 repaired this bridge is immaterial, whether such repairs were made in ignorance of the law or as a gratuity. Blair county could not be estopped thereby. The doctrine of estoppel does not apply in such a case to a public corporation: *Platter v. Commissioners*, 103 Ind. 360; nor are the elements of estoppel present in this case: *Bigelow on Estoppel*, 480. The local law could not be repealed by non-user: *Homer v. Commonwealth*, 106 Pa. 221. The authority of county commissioners is limited and statutory: *Lancaster Co. v. Fulton*, 128 Pa. 48; and their duty as to repair of bridges is statutory: *Rapho v. Moore*, 68 Pa. 406. Without authority from a statute, they cannot bind the county by recognizing or assuming an obligation.

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OPINION, MR. JUSTICE STERRETT :

This action was brought by the widow and minor child of Henry Shadler to recover damages for the death of the latter, caused, as the jury found, by the negligence of the county.

It appears that the deceased, Mr. Shadler, was engaged in threshing for farmers in the vicinity of Williamsburg. At that place, the Juniata river, dividing the townships of Woodbury and Catharine, in said county, was spanned by a bridge about 180 feet long. In November, 1887, Shadler took his traction engine, without separator, and started to cross the bridge. When he had passed over about twenty feet of that structure, it suddenly broke down, threw the steam-engine and boiler into the river, killed Shadler, and injured his assistant.

The evidence tended strongly to show that the joist beams and other important timbers of the bridge were badly decayed, and that the structure generally was in bad repair; that ordinary inspection would have disclosed these defects, and that the duty of keeping the bridge in safe condition for ordinary purposes of travel had been sadly neglected. It further appeared that the bridge was built by the county of Huntingdon in 1839, and was entered of record as a county bridge; that in 1846 Blair county was formed from parts of Bedford and Huntingdon, embracing the townships in which the bridge had been erected seven years before; that, from the organization of Blair county until the date of the accident, the bridge was known as a county bridge, and the only repairs ever made thereon were made by that county; that in 1871, and again in 1881, somewhat extensive repairs were made, but in the latter year the county commissioners neglected to replace the decayed joist beams and make other repairs necessary to render the bridge safe for ordinary travel.

The questions of fact presented by the evidence were submitted to the jury in a clear and comprehensive charge, to which no exception was taken. In affirming defendant's points, the learned judge, in effect, instructed the jury that if "Shadler, in attempting to cross the bridge, was using it in an extraordinary manner, or with an extraordinary vehicle of unusual weight, not suitable to a highway opened and prepared to be used in the common intercourse of society and in the transaction of the usual and ordinary affairs of business, he took upon

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himself the risk of injury, and the plaintiffs have no right to recover from the county, even though such injury was the result of such defects and imperfections of the bridge as would render the county liable to individuals lawfully and properly using the same;" that, before crossing the bridge, Shadler was bound to take notice of its apparent strength, the purpose for which it was built, and the kind of vehicles ordinarily used thereon, and if he took upon the bridge a vehicle of extraordinary weight, with such weight concentrated in an unusual manner, so as to be unusually perilous, then he was putting the bridge to an unusual and extraordinary use, and the plaintiffs are not entitled to recover; that, if an "ordinarily prudent man, in transporting a traction engine, such as his was, across the bridge, would have first examined the condition and strength of the bridge, then it was not ordinary prudence and care in Shadler to attempt to cross as he did;" that "the duty of the county commissioners was well performed if the bridge was in a reasonably safe condition for travel, in the ordinary mode used in the neighborhood, by people who commonly used said bridge." In view of these and other well-guarded and proper instructions, the jury must have found that, without any fault of his own, the deceased lost his life in consequence of the negligence of those whose duty it was to keep the bridge in proper condition for public travel. The questions of fact submitted to the jury were thus definitely settled in favor of the plaintiffs.

The main ground of defence, however, was that the county defendant could not in any event be liable, because, under the law applicable to the territory out of which it was formed, it was not the duty of the defendant to repair the bridge. The court was accordingly requested to charge that, the bridge "being in a part of Huntingdon county which was separated therefrom in 1846 to form the county of Blair, and the act of April 13, 1843, imposing on counties the liability to repair county bridges, having been repealed as to Huntingdon county by the act of March 11, 1844, there can be no recovery in this case, and the verdict must be for defendant." The facts of which that legal proposition is predicated being undisputed, the question of law presented therein was reserved by the court, with the right to enter judgment non obstante veredicto. That

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was afterwards done, and the question now is whether the learned judge did not err in so doing.

The act of April 13, 1843, P. L. 221, expressly declares: "It shall be the duty of the county commissioners of the several counties of the commonwealth to repair all bridges erected by the county, and to pay the expense of such repairs out of the county treasury in the usual manner." This is undoubtedly the general law of the state on the subject of repairing county bridges, and was so when the county defendant in 1846 was erected out of parts of Bedford and Huntingdon counties. The first section of the act of February 26, 1846, P. L. 64, after specifying the territory that was thereby erected "into a new and separate county, to be called Blair," declares: "The inhabitants thereof shall, from the fourth Monday of July next, have all such courts, jurisdictions, officers, rights, and privileges as the inhabitants of the other counties of this commonwealth are or may be entitled to; and all officers therein shall be qualified in the same manner and be subject to perform the same duties as other similar officers in said other counties." This is followed by a provision for electing, at the next township, borough, and general elections, such officers as, under the general law of the state, the qualified electors of other counties were authorized to elect. "The other counties of this commonwealth," referred to in the act, are evidently those counties that were then and still are subject to the general law relating to township, borough, and county officers, and prescribing their duties. The supplement of April 20, 1846, P. L. 398, to the act creating Blair county, provides that the governor shall, on or before the second Monday of June next, "appoint three judicious persons as commissioners of said county, to serve until their successors shall be duly elected and qualified, who shall perform the usual duties of county commissioners." One of the usual duties of county commissioners then, as now, was to keep county bridges in good repair; and, in so interpreting the law, at that time and for many years thereafter, we think the commissioners of Blair county were right. The mistake that was ultimately made by their successors in office was in neglecting to discharge that duty as they should have done, and in then attempting to evade

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the consequences of their negligence by repudiating the obligation which that long-recognized duty imposed on them.

It is impossible to consider the provisions of the act of 1846, to which reference has been made, without coming to the conclusion that, in erecting the new county of Blair, the legislature intended to subject the territory embraced therein to the general laws of the state, relating not only to the election and qualification of township, borough, and other officers, but also to the duties of such officers, respectively, as prescribed by said general laws. The act, in express terms, declares that "all officers therein shall be qualified in the same manner, and be subject to perform the same duties," as similar officers in the other counties of the state generally. If that be so, it was clearly the duty of the county commissioners, under the general law, to repair the bridge in question. For more than forty years they recognized that duty, and undertook to perform it. It was not until after Shadler was killed in consequence of their negligence, as the jury found, that they attempted to deny the existence of the obligation they had theretofore recognized and assumed to perform. We think, therefore, that the learned judge erred in entering judgment for defendant non obstante veredicto.

Judgment reversed; and judgment is now entered on the verdict, in favor of plaintiffs, for \$2,000, with interest from January 29, 1890, the date of the verdict.

SUSQUEHANNA M. F. INS. CO. v. J. L. LEAVY.

APPEALS BY PLAINTIFF FROM THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY.

Argued April 25, 1890—Decided October 6, 1890.

[To be reported.]

1. When a contract provides that it shall become void on default in its performance by one of the parties, such party cannot take advantage of his own wrong by setting up such default, alone, as a means of escaping liability under the contract, unless its terms are clearly to this effect.

136	499
136	519

136	499
26 SC	273

136	499
31 SC	296

136	499
f 34 SC	525

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2. An insurance policy provided that on thirty days' default in the payment of interest, or any assessment, on the premium note given therefor, the policy should cease: this stipulation being for the insurer's benefit, the company might waive it, and collect assessments levied after as well as before such default.
3. Moreover, such levy and collection are clearly authorized by a by-law which provides that, notwithstanding a failure of the insured to pay the interest and assessments, the directors shall retain the premium note and collect thereon all sums due or to become due during the term for which it was originally given.
4. When a policy issued by a mutual company of which all the insured are members, is expressly made and accepted "with reference to the by-laws of the company which are made part of the policy," the policy holder is presumed to have knowledge of and is bound by a by-law, though not appended to the policy.
5. The construction given to the by-laws of the Susquehanna Mut. F. Ins. Co., as to the order and manner in which different classes of policies shall be assessed for losses, in *Susquehanna Ins. Co. v. Stauffer*, 125 Pa. 416, and *Thropp v. Insurance Co.*, 125 Pa. 427, reaffirmed and followed: *Susquehanna Ins. Co. v. Gackenbach*, 115 Pa. 492, distinguished.
- (a) A by-law provided that premium "notes subject to the payment of annual interest, and deposit notes upon which the interests have been paid in advance," should not be assessed until all other notes should have paid assessments equal to the interest paid and to be paid within the next succeeding six months:
6. A premium note subject to the payment of annual interest, upon which no interest has ever been paid, although more than a year has elapsed since its date, is not within the excepted class of notes, and is liable to regular assessment in the first instance.
7. When different classes of premium notes are all to be assessed ratably, and their amounts vary according to the form of the policy, the equitable and proper method of assessment is, not by percentages upon their face, but upon the basis of the rating of the risk, applied to the amount insured.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS and MITCHELL, JJ.

Nos. 382 and 383 January Term 1890, Sup. Ct. ; court below, Nos. 244 June Term 1879, 581 September Term 1887, C. P.

On May 12, 1879, there was entered in the court below, by appeal from the judgment of a justice of the peace, an action brought by the Susquehanna Mutual Fire Insurance Company against James L. Leavy, to recover the amount of an assessment levied by the plaintiff, upon a premium note given by

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the defendant to the plaintiff in consideration of a policy of insurance. The defendant's pleas were non-assumpsit and payment with leave.

On August 24, 1887, the same plaintiff brought assumpsit against the same defendant for the amounts of several additional assessments upon the same premium note. In this action the defendant pleaded non-assumpsit.

The two cases were tried together on May 15, 1889, when the following facts were shown upon the part of the plaintiff:

On September 21, 1876, the defendant made application in writing to the plaintiff company for a policy of insurance against fire and lightning, to continue for three years, on his hotel property in Curwensville, in the sum of \$2,500. Attached to the application was the following premium note:

"\$825.00. For value received, in Policy No. 1006, risk commencing the 21st day of September A. D. 1876, issued by the Susquehanna Mutual Fire Insurance Company, I promise to pay to said company, or their treasurer, for the time being, the sum of Eight Hundred and Twenty-five Dollars, in such portions and at such time or times as the directors of said company may, for the purpose of paying losses by fire or lightning and the necessary expenses of said company, agreeably to the act of assembly governing insurance companies, with the various supplements thereto, and the by-laws of the company, require, payable within thirty days after notice and demand.

"Witness my hand at Clearfield the 21st day of September A. D. 1876.

JAMES L. LEAVY."

At the time of making the application the defendant paid to the plaintiff \$49.50.

On September 23, 1876, the policy applied for was issued by the company, was numbered 1006, and contained the following clauses:

"In addition to the cash premium, the insured has deposited a premium note subject to the payment of six per cent interest annually; and agrees to pay all such assessments as may be made thereon for the purpose of paying losses and the necessary expenses of the company, occurring during the term of this policy, in conformity with Application No. 1006, signed by the assured and on file with this company, which is made a part of this policy;"

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"And it is moreover agreed and declared, That this policy is made and accepted in reference to the by-laws of this company; also the application and the conditions hereto annexed, which are made a part of this policy, and to be used and resorted to, in order to explain the rights and obligations of the parties hereto."

Among the conditions of insurance, referred to in the policy and indorsed upon it, was the following:

"5. No insurance shall be considered as binding until the actual cash payment of the premium; and should the annual interest, or any assessment that may be levied on the premium note given for this insurance, be in arrears and unpaid for the space of thirty days after notice and demand, then, and in every such case, this policy shall cease."

The by-laws of the company, in force at the time the policy was applied for and issued, provided as follows:

"Sec. 25. If any assessment that may hereafter be levied on a premium note be and remain unpaid after the day fixed by the secretary for the payment of the same, shall render absolutely void all policies on which the assessment may remain unpaid as above, and be a full bar against such defaulting member for all losses that may occur during the time the assessment may so remain unpaid; and the directors shall retain such premium note or notes and collect thereon all such sum or sums as may be due or become due thereon, during the term for which it has originally been given."

"Sec. 30. If at any time hereafter an assessment shall be made, the amount to be levied on premium notes shall be rated according to the following classification, to wit:

"First. All premium notes in force at the time the assessment may be declared, shall be liable to assessment for all losses unadjusted and unpaid at that time, subject to abatement as hereinafter specified.

"Second. All premium notes which have expired and are not in force at the time such assessment is declared, shall, nevertheless, be liable to assessment for all unpaid losses which existed at the time of the expiration of such premium note or notes, pro rata with all other premium notes then in force, and the amount thus ascertained and levied upon such expired premium notes to be deducted from the gross amount of

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liabilities of the company, for which such assessment is to be made, and balance of liabilities then remaining to be assessed upon the premium notes then in force.

"Third. Notes subject to the payment of annual interest, and deposit notes upon which the interests have been paid in advance, shall not be assessed until all other notes held by the company, liable to assessment, shall have first paid in assessments an amount equal to the interest paid and to be paid within the six months next succeeding the date of such assessment; any deficiency then existing may be equitably assessed on all the notes held by the company."

The following amendment was adopted on April 3, 1877:

"Hereafter all assessments by this company, to be made in conformity with the 'all cash' rates on properties of similar character, and that the secretary be required to adjust or fix the basis, for the purpose of assessing, at twenty times the annual 'all cash' premiums, irrespective of the amount of the premium notes held by the company on property insured, and on which assessments may be made."

A new set of by-laws, adopted January 21, 1879, contained the following provisions:

"Sec. 26. All persons insuring in this company, or who may have policies assigned to them, shall thereby become members of this company during the term of their policy or policies, and shall stand bound and obliged to pay all such assessments as may be made on their premium notes or policies of insurance, in accordance with these by-laws. All assessments that may be made, shall be based on the annual 'all cash' or 'schedule' premiums, and the basis for assessments shall be fixed at twenty times such 'all cash' or 'schedule' premium.

"Sec. 27. If, at any time hereafter, an assessment shall be made, the amount to be levied on premium notes, or policies of insurance, shall be rated according to the following classification, to wit:

"First. All members whose policies are in force at the time the assessment may be declared, shall be liable to assessment for all losses adjusted, unadjusted and unpaid, and all other liabilities then existing against the company, subject to abatement as hereinafter specified.

"Second. All members whose policies have expired and are

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not in force at the time such assessment is declared, shall, nevertheless, be liable to assessment for all unpaid losses and other liabilities which existed at the time of the expiration of such policy or policies, pro rata with those then in force, and the amount thus ascertained and levied upon such expired policies, to be deducted from the gross amount of liabilities of the company for which such assessment is to be made, and balance of liabilities then remaining to be assessed upon the policies then in force.

"Third. Notes received previous to February 1st, 1879, subject to the payment of annual interest, and deposit notes upon which the interests have been paid in advance, shall not be assessed until all other notes held by the company, liable to assessment, shall have first been assessed an amount equal to the interest paid, and to be paid, within the six months next succeeding the date of such assessment; any deficiency then existing may be equitably assessed on all the notes held by the company.

"Sec. 28. If any member neglects or refuses to pay any assessment that may be levied on a premium note, policy of insurance or adjusted basis, on or before the day fixed by the secretary for the payment of the same, then, and in every such case, the policy given upon such note, or other obligation, shall be void until the assessments be or are actually paid; and no member shall be entitled to recover from this company for any loss that may happen under a policy on which the assessment may or shall so remain unpaid; nevertheless, such member or members shall be liable for all assessments which may be levied during the suspension of such policy on account of the non-payment of a previous assessment; and the directors shall retain such premium note, or other obligation, and collect the amount so assessed."

"Sec. 30. Policies issued after February 1st. A. D. 1879, on the 'interest plan,' shall be exempt from all assessments beyond the amount of interest on the deposit notes, at the rate of six per cent per annum, during the term of each and every policy, and the admission premium of five per cent on the deposit notes for either a three or five year policy, and of seven and one half per cent for a ten year policy. The deposit notes for such policies are to be taken for fourteen times the annual cash rate premium."

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At various times between July 13, 1877, and June 4, 1887, assessments were levied upon the defendant's premium note, to provide for the payment of expenses and losses incurred during the term of his policy. Those assessments aggregated \$866.25. The suit at No. 244 June Term 1879, was brought to recover an assessment, designated as regular assessment No. 4, levied September 13, 1878, for \$97.50. The suit at No. 581 September Term 1887, was for the amounts of seven others, designated as regular assessments Nos. 7 to 14, aggregating \$341.25, levied at intervals between August 15, 1881, and June 4, 1887. Upon the levying of each of these assessments, notice thereof was given by the company to the defendant.

The method of calculating and levying the assessments pursued by the company, was described by its secretary, B. K. Huntzinger, testifying for the plaintiff, in substance as follows:

The company issued two kinds of assessment policies, known respectively as "regular assessment" and as "interest" policies. In the case of the former, premium notes were taken usually for a sum equal to the whole amount of the insurance. In the case of the latter, the principal of the premium notes was fixed at eleven times the "premium note," which varied with the character of the risk, and such note would bear interest, payable annually. In order to make an equitable apportionment of the assessments between the different kinds of policies, the amount of the assessment levied on each particular policy was fixed, not by a percentage of the face of the premium note, but upon the basis of the premium rate for the risk. What was known as the "assessment basis" was calculated for each policy by multiplying the premium rate by twenty, and the assessments were then made by percentages of the assessment basis, so ascertained. Thus, the premium rate upon the defendant's policy was 3 per cent, and the amount of his insurance was \$2,500; 3 per cent of \$2,500 is \$75, and that sum, multiplied by twenty, gives, as the assessment basis for that policy, \$1,500. Assessment No. 4, above mentioned, was laid at the rate of 6½ per cent. The defendant's proportion of it was therefore 6½ per cent of \$1,500, making the amount payable by him \$97.50. The other assessments sued for were levied in the same manner.

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These different assessments were laid, proportionately, according to the assessment basis, upon all the regular assessment policies in force at the time of the losses to be provided for, and upon all interest policies, in force at the same time, the holders of which had not paid up the interest thereon, except certain policies the holders of which were insolvent at the dates of the assessments. In any case where the interest was paid up, it would be a credit on the assessment in favor of the policy holder. The defendant's policy was an interest policy, but as he had never paid any interest, his policy was assessed in the same manner as a regular assessment policy.

At the close of the testimony for the plaintiff, the court, KREBS, P. J., on motion of the defendant, entered judgments of compulsory nonsuit, stating as the grounds thereof, (a) that, under the testimony for the plaintiff, the assessments sued for were not so levied as to be in compliance with the terms of the contract between the parties; and (b) that the condition of the policy providing that it should cease if the annual interest or any assessment should "be in arrears or remain unpaid for the space of thirty days after demand and notice," was a bar to the recovery of the assessments in suit.

Rules to take off the nonsuits, after argument, were discharged, KREBS, P. J., filing an opinion which, after reciting the facts, and holding that the by-laws of 1879 could not affect the legal rights of the parties to the contract, inasmuch as there was no evidence that the defendant had ever received notice of or assented to the change, citing on this point *Insurance Co. v. Connor*, 17 Pa. 136, proceeded as follows:

The question for consideration is, does the contract between the parties authorize this method of assessment?

The policy is admitted by the company to be an interest-bearing policy, and the premium note accompanying the policy is an interest-bearing note, the amount of the note being fixed by rates and rules differing widely from the method of fixing the amount of the note accompanying a regular assessment policy. But in addition to this, the policy and the premium note both provide that the by-laws shall be taken as part of the contract; and the note particularly declares that the assured

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shall pay "the sum of \$825 in such portions and at such time or times as the directors of the company may for the purpose of paying losses by fire or lightning and the necessary expenses of the company, agreeably to the act of assembly governing insurance companies, with the various supplements thereto, and the by-laws of the company, require, within thirty days after notice and demand."

As has been seen, the third clause of § 30 of the by-laws of June, 1876, makes distinct provision for this class of policy, interest-bearing. It is admitted by the secretary of the company that the assessments sued for, were not levied in accordance therewith. By what right or authority in law has the company the power to levy assessments, other than according to the letter of the contract between the assured and the company? It is alleged that the assured did not pay the interest on this premium note, and therefore the company assess it as a "regular assessment" policy. But there is no provision anywhere that I can find in the papers and by-laws, which go to make up the contract between the parties, that confers this power on the company. The assured by the terms of the note agreed to pay \$825 in such portions as the directors might determine. How? In accordance with the statutes regulating insurance and the by-laws of the company; and the company is as much bound by the contract thus made and entered into as the assured. These assessments are not made on the note of \$825, but upon an adjusted basis of \$1,500. The assessment No. 4 is \$97.50, or $6\frac{1}{2}$ per cent on \$1,500; while on the note it would be \$58.62 $\frac{1}{2}$.

In the case of Insurance Co. v. Connor, 17 Pa. 142, LEWIS, J., says: "If he (Connor) neglected to pay interest on his note, the remedy provided was to call in the principal. Poverty, accident, illness, and various circumstances beyond his control, may prevent the payment of interest without any wilful default. Under such circumstances, the remedies existing at the time of the contract, or such as the law may provide for enforcing the payment, are all that can be resorted to." It was no more difficult for the company to levy the assessment in the method pointed out by the third clause of by-law, 1876, § 30, and sue the assured, than it was to levy the assessment in the manner admitted by the testimony of Mr. Huntzinger. Their attempt

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to change the mode would in effect change the entire form of contract, and cannot be permitted.

As has been already noticed, all the assessments sued for are levied in the same way as if upon a "regular assessment" policy, and not, as in fact they should have been, upon an interest-bearing policy. Nor, can it make the slightest difference in reaching a decision of the question, that the amount of assessment should be the same by both methods. In the very nature of things, under the by-laws this could not be so, for the notes on the different policies vary largely in amount. These assessments not having been made in accordance with the by-laws as pointed out, cannot be recovered in these actions.

Another reason stated for entering the nonsuit at the trial, was that the by-laws applying to these cases, namely, June 6, 1876, fell within the construction placed upon what was before the Supreme Court in *Susquehanna Ins. Co. v. Gackenbach*, 115 Pa. 492. As has been remarked, the by-laws of this company that were before the Supreme Court in the case, *Susquehanna Ins. Co. v. Stauffer*, 125 Pa. 416, and there construed by MITCHELL, J., are the by-laws of January 21, 1879, not applicable to this case. They differ in some parts; whether materially or not, it is not necessary to discuss, under the foregoing views we have reached in this case.

There is, however, a condition annexed to this policy which was noticed at the trial. The policy provides: "And it is moreover agreed and declared, That this policy is made and accepted in reference to the by-laws of this company; also the application and the conditions hereto annexed, which are made a part of this policy," etc. On the back of the policy are found indorsed these words: "Conditions of insurance," and under the fifth paragraph or clause are found these words: "No insurance shall be considered as binding until the actual cash payment of the premium; and should the annual interest, or any assessment that may be levied on the premium note given for this insurance, be in arrears and unpaid for the space of thirty days after notice and demand, then, and in every such case, this policy shall cease." The interest on the premium note is made payable annually. It does not say in advance, and therefore we infer the first annual interest fell due on September 21, 1877; and if the company made demand then, it

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became due under this condition on November 21, 1877, and nothing being paid under this condition of the contract, which the assured had before him, and the only one he had, the policy ceased.

It is true that § 25 of the by-laws of June 6, 1876, provide this: "If any assessments that may hereafter be levied on a premium note be and remain unpaid after the day fixed by the secretary for the payment of the same, shall render absolutely void all policies on which the assessment may remain unpaid as above, and be a full bar against such defaulting member for all losses that may occur during the time the assessment may so remain unpaid; and the directors shall retain such premium note or notes and collect thereon all such sums as may be due or become due thereon, during the term for which it has originally been given." Now, then, the policy, with the condition referred to, was put into the hands of the assured. He knew, therefore, that if he did not pay his interest or assessments, he forfeited his policy and the contract ceased. The company was absolved from all liability and he lost his advance premium. But we are met with the contention that the by-law must also be taken into consideration. This cannot and ought not to be so held. The company puts one condition before the assured, and says to him: "This is our contract; if you do not pay, the policy ceases," and withholds from him the other. Good faith, good morals, and good law, all require that the whole of the by-law should be put into the conditions on the policy and not a part only.

It is frequently found, indeed, all reputable mutual insurance companies that have this by-law, print it as a condition on the back of the policy, and thereby put it within the full knowledge of the assured. It is true, that the assured is a member of the company, but we all know that these mutual insurance companies are run and controlled entirely by the directors and officers, and that the membership, scattered far and wide, are no more actual participants in the management of the company than if they were not insured therein. This membership is a mere fiction in law.

We say, then, that this company is bound by this condition of the policy, and if there was a default in payment of assessment or interest, this policy ceased and ended, and assessments

Arguments.

could not legally be made after that date. But conceding, for the sake of argument, that the condition of the policy and by-law are to be read together, then this policy, under the testimony, would cease on November 21, 1877, and, under the by-law, it could be assessed only upon the plan or method relating to interest policies.

It is contended also, on the part of the defendant, that there is no evidence of the delivery of the policy to the defendant. He denies that he ever accepted it. We do not think it necessary to notice this point now. For the reasons given, we must decline to take off the nonsuit in this case. We have discussed the case at some length, so that upon a review by a higher court, the exact controversy here may be settled, and whatever that may be we shall gladly accept it as final.

Now, February 26, 1890, motion to take off compulsory nonsuit refused.

Thereupon the plaintiff took these appeals, specifying, *inter alia*, that the court erred:

1. In directing the judgments of nonsuit.
2. In refusing to take off the nonsuits.

Mr. Thomas H. Murray and Mr. R. D. Swoope (with *Mr. Cyrus Gordon*), for the appellant:

We maintain that under the by-laws in force at the date of the policy, the assessments were good and valid, and entitled the plaintiff to recover. Three principal propositions are involved in the assignments of error:

1. The assessments made in the first instance upon the policies in force at the time of the loss, to the exclusion of those in force at the time of the assessment, but not at the time of the loss, were in strict conformity, in this respect, with the requirements of clauses 1 and 2 of § 30 of the by-laws adopted June 6, 1876. If this by-law is substantially the same as that enacted in 1879 and passed on in *Susquehanna Ins. Co. v. Stauffer*, 125 Pa. 423, this proposition is sustained, and the two differ, as to this point, in no respect whatever. Again, in *Thropp v. Insurance Co.*, 125 Pa. 427, which was decided under the by-laws of 1876, this identical question was raised by the second assignment of error, and the validity of the assessments,

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some of which were the same assessments involved in the present case, was sustained.

2. The provision in the policy that upon failure to pay the interest or assessments for thirty days after notice and demand, the policy shall cease, does not bar a recovery of these assessments. This condition, being for the benefit of the company, may be waived by it: *State Ins. Co. v. Todd*, 83 Pa. 279; *Columbia Ins. Co. v. Buckley*, 83 Pa. 293; *Lebanon Ins. Co. v. Erb*, 112 Pa. 149; *Susquehanna Ins. Co.'s App.*, 105 Pa. 615. Moreover, § 25 of the by-laws expressly provides that when there is such default, the directors shall retain the premium note and collect thereon all sums due or to become due during the term for which it had originally been given. This by-law was, by reference in the policy, made a part of the contract, notwithstanding that a copy of it was not indorsed on the policy, and it was binding on the assured: *Susquehanna Ins. Co.'s App.*, 105 Pa. 623; *Susquehanna Ins. Co. v. Toy Co.*, 97 Pa. 431.

3. The assessments were not in conflict with the third clause of § 30 of the by-laws, relating to annual interest notes. That clause excepts such notes only to the extent of "the interest paid and to be paid within six months," and as no interest was ever paid by the defendant, and the first assessment here claimed was laid two years after the date of the policy, the company was justified in treating this as if it were an ordinary assessment policy. This is no longer an open question. It was expressly decided in *Crawford v. Insurance Co.*, 11 Cent. R. 653 (3 Pa. S. C. Dig. 107), which arose upon the same by-laws as the present case, that this method of assessing notes upon the annual interest plan, when no interest has been paid, is legal.

Mr. J. Frank Snyder and *Mr. John H. Orvis*, for the appellee:

In order that the plaintiff may recover, it is incumbent on it to show that the assessments sued for were lawfully made according to the terms of its charter and by-laws: *Susquehanna Ins. Co. v. Gackenbach*, 115 Pa. 498; *Wood on Fire Insurance*, 1218; *Atlantic Ins. Co. v. Fitzpatrick*, 2 Gray 279. We contend that all the assessments claimed in these actions are irregular and void.

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1. The assessments are void because they are not based upon the amount of the defendant's premium note, but upon a new basis of almost double that amount, fixed by a by-law which was adopted after the date of his contract and without his knowledge or consent; and they are largely in excess of the extent of his liability under the contract. The language of the by-laws of 1876 is plain, and admits of but one meaning on this point. Under them, the premium notes are to be the basis of assessment, and the defendant's liability would be measured by the proportion which the amount of his note bore to the aggregate of the notes held by the company. If there were any doubt as to this, the language of the amendment of 1877 clearly indicates that such had been the rule. That amendment and the by-laws of 1879 could not, without the defendant's consent, alter his rights as a party insured: *Insurance Co. v. Connor*, 17 Pa. 142; *Rosenberger v. Insurance Co.*, 87 Pa. 212; *Revere v. Copper Co.*, 15 Pick. 363.

2. The assessments are void because all the premium notes in force at the time the assessments were laid, were not included therein, some of them being intentionally omitted. The by-laws exempt no class of notes, but require that all shall be assessed. The intentional omission of any will invalidate an assessment: *Marblehead Ins. Co. v. Hayward*, 3 Gray 208; *Wood on Fire Insurance*, 1218; *Susquehanna Ins. Co. v. Gackebach*, 115 Pa. 500. The general rule of law is that assessments on any particular note must be restricted to losses occurring after its date: *Wood on Fire Insurance*, 1218; *Long Pond Ins. Co. v. Houghton*, 6 Gray 77. But § 30 of the by-laws of 1876 changes this rule, and, whilst it imposes on the assured the burden of contributing to liabilities previously incurred, it benefits him by requiring all who become insured after him to contribute proportionately with him to the losses occurring during the term of his insurance. It is competent for the parties to make such a contract, and the directors have no right to make assessments on another basis: *Susquehanna Ins. Co. v. Gackebach*, 115 Pa. 500.

3. The construction of these by-laws which the defendant contends for, is a most favorable one for him, it is true; but they were made by the company for its own benefit, and if the meaning is doubtful, this is the company's fault. That con-

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struction must be adopted which is most favorable to the assured: *Western Ins. Co. v. Cropper*, 32 Pa. 351. The reason given for assessing the defendant's interest policy and omitting other interest policies, was that he had never paid any interest. His note does not contain one word about interest, but the \$49.50 paid at the time of the application was exactly one year's interest on the amount of the note, and if this was not paid for the first year's interest, what was it paid for? By reason of that payment no interest would be due until September 21, 1878. Two assessments were made before that, and if this interest policy was properly assessable, all other like policies should have been assessed also. No authority has been shown for the omission from the assessments of notes of members supposed to be insolvent.

NO. 388.

OPINION, MR. JUSTICE CLARK:

These two cases, brought by the Susquehanna Mutual Fire Insurance Company against James L. Leavy, were tried together, in the court below, and, although separate appeals were taken, they were argued together here. The first action was brought to recover assessment No. 4, and the second to recover assessments Nos. 7, 8, 9, 10, 11, 12, and 14 upon the defendant's premium note or policy No. 1006. The policy issued September 21, 1876, and provided for insurance to the amount of \$2,500 on the defendant's hotel in Curwensville, for loss from fire, for three years; it was what was known as an "annual interest policy," the premium note accompanying the application being subject to the payment of 6 per cent interest annually.

The plaintiff exhibited the note in evidence, and proved the assessments; the method or manner in which they were made; and that, although due and proper notice had been given, they had not been paid. At the close of the plaintiff's case, the court entered a compulsory nonsuit, and the refusal of the court to take the nonsuit off is the error assigned.

The reasons assigned in the opinion filed, are, first that as a consequence of the non-payment of the interest on the premium note, and of the assessments thereon, the policy became forfeited and void, and, although the note might under the twenty-fifth section of the by-laws, be retained for the collection of the

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interest, the assessments upon it could neither be legally made nor collected after the policy became void; and, second, that the method of the assessment does not appear to have been authorized by the by-laws of the company in force when the policy issued.

The policy, by its express terms, was made and accepted with reference to the application, the by-laws of the company, and the conditions annexed thereto, which were declared to be a part of the policy. The fifth condition is as follows:

"No insurance shall be considered as binding until the actual cash payment of the premiums; and should the annual interest, or any assessment that may be levied on the premium note given for this insurance, be in arrears and unpaid, for the space of thirty days after notice and demand, then, and in every such case, this policy shall cease."

It is conceded that, although due and proper notice was given, neither the annual interest nor any assessments were paid, as provided by the policy, and it is contended that the policy and the premium note are ipso facto void. But, as this provision was clearly for the especial benefit of the company, it was competent for the company to waive the protection which was intended: *State Ins. Co. v. Todd*, 83 Pa. 279; *Columbia Ins. Co. v. Buckley*, 83 Pa. 293; *Susquehanna Ins. Co.'s App.*, 105 Pa. 615; *Lebanon Ins. Co. v. Erb*, 112 Pa. 149. The defendant cannot take advantage of his own wrong, or set up his own default, alone, to work a forfeiture of his contract, unless its terms are clearly to this effect. The right of the company was optional; they might either forfeit the contract or affirm its continuance, and there is evidence of the strongest character to show that the company chose to do the latter: *Galey v. Kellerman*, 123 Pa. 491; *Wills v. Manufacturers' N. Gas Co.*, 130 Pa. 222. Moreover, the express provision of the twenty-fifth by-law of the company is that, notwithstanding the failure of the insured to pay the interest and assessments, "the directors shall retain such premium note or notes and collect thereon all such sums as may be due or become due thereon, during the term for which it has originally been given." It is of no consequence that this by-law of the company was not indorsed upon the policy. The policy was made and accepted, "with reference to the by-laws of this company; and also the appli-

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cation and conditions annexed, which are made part of the policy;" and these are "to be used and resorted to, in order to explain the rights and obligations of the parties." The company was a mutual company, and the defendant was a member of it. He is therefore presumed to have known of the existence of this by-law from the date of his membership: *Susquehanna Ins. Co.'s App.*, 105 Pa. 615; *Susquehanna Ins. Co. v. Toy Co.*, 97 Pa. 481. The company had a right, therefore, to retain this note, and "to collect thereon all such sum or sums as may be due or become due thereon, during the time for which it had originally been given;" and this clearly includes the annual interest which might accrue and the assessments made upon it. We are of opinion, therefore, in view of the evidence, that the court was wrong in declaring the policy to be void for non-payment of interests and assessments.

But it is contended that even if the policy and note were not void from forfeiture, the mode of assessment adopted by the company was not in conformity with the contract. The by-laws of June 6, 1876, in the first and second clauses of § 30, provide:

"Sec. 30. If at any time hereafter an assessment shall be made, the amount to be levied on premium notes shall be rated according to the following classification, to wit:

"First. All premium notes in force at the time the assessment may be declared, shall be liable to assessment for all losses unadjusted and unpaid at that time, subject to abatement as hereinafter specified.

"Second. All premium notes which have expired and are not in force at the time such assessment is declared, shall, nevertheless, be liable to assessment for all unpaid losses which existed at the time of the expiration of such premium note or notes, pro rata with all other premium notes then in force, and the amount thus ascertained and levied upon such expired premium notes to be deducted from the gross amount of the liabilities of the company, for which such assessment is to be made, and balance of the liabilities then remaining to be assessed upon the premium notes then in force."

These sections were subsequently revised by the company, and on January 21, 1879, were adopted in a somewhat different form; the meaning, however, so far as they affect the questions

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involved in this case, was not greatly, if any, changed. The same method of assessment, with but little modification, is provided for; both series of by-laws are susceptible of the same general construction in this respect. These by-laws of 1879 came before this court for construction in *Susquehanna Ins. Co. v. Gackenbach*, 115 Pa. 492; but in that case the record was inaccurate, some words of the by-law having been omitted, and other words inserted, which wholly changed its meaning. Whilst the decision in that case was right, according to the record, it has no application here, for the by-law, as it appears in this record, is different, and calls for an entirely different construction. The proper construction was afterwards given in *Susquehanna Ins. Co. v. Stauffer*, 125 Pa. 416. "The wording of this by-law," said Mr. Justice MITCHELL, who delivered the opinion of the court, "is confused and obscure, but the general scheme intended is reasonably clear. It is, that all policies which were in force at the time of the assessment, or at the time of the loss, both or either, (as the case may be,) shall be liable for the loss, but the assessment shall be laid, in the first instance, upon the policies in force at the time of the loss, whether since expired or not; and the policies, issued subsequent to the loss and remaining in force at the time of the assessment, are to be assessed only for the balance if the first branch of the assessment should be insufficient. In pursuance of this general intent, the first clause directs, not that all members whose policies are in force at the time the assessment is declared shall be assessed, but that they shall be liable to assessment, and qualifies this liability by making it subject to a specified abatement. The second clause then proceeds to define the abatement, which is that policies now expired, but which were in force when the liability accrued, shall be assessed pro rata with all the policies then in force, i. e., at the time of the loss or liability incurred, and this first branch of the assessment shall be deducted from the total of liabilities, and the balance only be then assessed upon the other policies 'then in force,' i. e., those which were in force at the time of the loss, and which have not yet expired." To the same effect, also, is *Thropp v. Insurance Co.*, 125 Pa. 427, where the same construction given to the by-laws of 1879 was given to the by-laws of 1876. We understand, from what the witness Huntzinger testifies, that the assessments were made upon the premium

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notes in conformity with this construction of the by-laws, and according to the classification therein recognized.

But the note in suit, as we have said, was an annual-interest note; and, in reference to such notes, it is, in the third clause of the thirtieth section of the by-laws of 1876, provided as follows:

“Third. Notes subject to the payment of annual interest, and deposit notes upon which the interests have been paid in advance, shall not be assessed until all other notes held by the company, liable to assessment, shall have first paid in assessments an amount equal to the interest paid and to be paid within six months next succeeding the date of such assessment; any deficiency then existing may be equitably assessed on all the notes held by the company.”

No interest had been paid on this premium note: all that had been paid was the cash premium; and, although in this particular instance, that was just 6 per cent upon the premium note, it was not paid as interest, nor was it so regarded. The interest upon the note was wholly unpaid; and, as the note by its terms was liable to assessment for losses, and was not embraced in the excepted class defined in this third clause, we can see no reason why it should have been omitted in the assessment. “Annual interest and deposit notes, upon which the interests” had been paid, were not liable to assessments “until the other notes had paid in on assessments an amount equal to the interest thus paid and to be paid within six months,” etc.; but Leavy had paid no interest, and his liability was not affected. Those only who had paid the annual interest were entitled to abatement; any deficiency then existing to be equitably assessed on all the notes held by the company, according to the classification already referred to.

In whatever form the policy is issued, however, it appears that what is termed the “schedule premium” forms the uniform basis of assessment. The schedule premium is the result of the rate applied to the amount of the insurance. Property is rated for insurance according to the supposed risk; it may be rated at 1, 2, 3, or more per cent upon the amount, according to the risk. Thus, in the case in hand, the property was rated at 3 per cent, which rate applied to the \$2,500, the amount of insurance, gives the schedule premium, \$75. The schedule

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premium multiplied by 11 determines the amount of the premium note, which is the basis upon which the annual interest is to be paid; and multiplied by 20, determines the practical basis of the assessment. This basis of assessment is uniform, and applies to all premium notes, whether taken upon the annual interest or general assessment plan; for it would seem that all premium notes subject to the provision of § 80 of the by-laws are liable to assessment. As to the liability to assessment of persons insured under the deposit note plan, the testimony is not very clear. According to that portion of § 80, quoted above, it might appear that they are, in a certain contingency.

Under the general assessment plan, the premium notes were taken in a sum much larger than under the annual interest plan, in which latter case the amount was fixed with reference to the annual interest payment. It would therefore be grossly inequitable and unjust to assess these different classes of notes according to the same rate. The by-law provides that in a certain contingency "all the notes held by the company shall be equitably assessed" to make up the deficiency. As the different classes of notes were drawn in sums entirely disproportionate to the risks incurred, it was but equitable and just that some scheme should be adopted to establish a uniform and just basis of assessment. To accomplish this purpose, assessments were in all cases made upon the true and proper basis of the rate of the risk, applied to the amount insured. This gives, in each case, the schedule premium, which is, in fact, the true basis of the assessment; the multiplication of this by 20 was simply for convenience, and, as this was done in all cases, the results were uniform. The assessments were upon the note, but they were for a sum, or according to a uniform rate, ascertained in the manner specified. This method was just and equitable, we think, and did not need the amendment of 1877, or the by-laws of January 21, 1879, to sustain it. It is difficult to see how all the notes held by the company could have been equitably assessed in any other way. It may be conceded that the defendant was not liable for assessments beyond the amount of the note, but, as the note carried interest from its date, that limit was not reached. This particular form and method of assessment was approved in *Crawford v. Insurance Co.*, reported

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in 11 Cent. R. 653, and we can see no reason why we should not adhere to the rulings in that case.

The Judgment is therefore reversed, and a venire facias de novo awarded.

NO. 382.

OPINION, MR. JUSTICE CLARK :

For reasons given in our opinion, ante, 513, between the same parties, this

Judgment is reversed, and a venire facias de novo awarded.

JACOB LIVINGSTON v. J. H. WOLF.

APPEAL BY PLAINTIFF FROM THE COURT OF COMMON PLEAS
OF CUMBERLAND COUNTY.

Argued April 28, 1890—Decided October 6, 1890.

[To be reported.]

1. The foot ways, no less than the carriage ways, in cities and boroughs, are under municipal control ; and the authorities may determine the extent to which the sidewalks may be obstructed by cellar doors, door-steps, awnings, bay-windows, cornices and the like.
2. This power must be exercised under regulations that are general and uniform, that are reasonable and certain, and that are in conformity with the constitution and the laws : Paul v. Carver, 26 Pa. 223 ; Kneedler v. Norristown, 100 Pa. 368 ; Reimer's App., 100 Pa. 182.
3. Under regulations that are reasonable in character and general in their application, cities and boroughs have power to permit the use of portions of the highways for approaches to and for ornamental work upon buildings standing on the street line.
4. A borough ordinance authorizing the use of 3 feet 6 inches of the foot way for cellar entrances, and prohibiting bay-windows projecting more than 28 inches, on a street 60 feet wide, is not unreasonable ; and under it an over-hanging balcony and bay-window projecting less than those limits will not be enjoined.
5. If the conclusion in this case could be regarded as doubtful, the decree dismissing the bill of an adjoining owner for an injunction, would nevertheless be affirmed upon the finding of the master that the structures complained of caused no appreciable injury to the plaintiff.

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160 375
136 519
171 561

136 519
21 SC 554

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23 SC 211

136 519
30 SC 205

Master's Report.

Before STERRETT, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 76 May Term 1889, Sup. Ct.; court below, No. 4 August Term 1884, C. P. in Equity.

On June 18, 1884, Jacob Livingston filed a bill in equity against John H. Wolf, and others, his contractor and their employees, averring, in substance :

That plaintiff and defendant Wolf owned adjoining lots fronting on North Hanover street in the borough of Carlisle; that upon the plaintiff's lot was built a valuable residence, and a residence was building upon the lot of the defendant, the front walls of both dwellings being bounded at the level of the pavement by the eastern line of the street.

That the defendant Wolf had begun the construction of a balcony, sixteen feet above the pavement and projecting three feet over the building line into the street, and intended to construct, also, second and third story bay-windows projecting in like manner three feet into the public highway, and that said structures, if completed, would be a nuisance and injury to the plaintiff.

The prayers of the bill were for an injunction restraining the construction of said balcony and bay-windows, and for general relief.

The answer of the defendants admitted the material averments of the bill, except that it was averred that the bay-windows, extending from the floor of the balcony to within about four feet from the cornice of the house, would project but two feet four inches from the front of the building; that neither of the structures would project farther from the building line than was permitted by the borough ordinances; and it was denied that the structures would constitute a nuisance to the plaintiff.

Issue having been joined, the cause was referred to *Mr. H. S. Stuart*, as examiner and master, who subsequently reported as follows :

Hanover street is one of the principal thoroughfares in the borough of Carlisle. It is a public highway eighty feet wide, laid out by the Penns, the proprietaries of the province at the

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time the borough of Carlisle was originally laid out. The lots on either side of this street were numbered and sold, and were described in the conveyances as bounded on the east or west, as the case might be, by Hanover street. The lots were sixty feet wide and two hundred and forty feet in depth. The distance from the base of these lots to the building line of the street is two hundred and forty feet. Mr. Wolf's house is situated on a part of one of these lots, and immediately adjoining, on a part of another of these lots, is situated Mr. Livingston's house. Both houses are on the eastern side of said North Hanover street about midway between Louthier street and Mulberry alley. The Livingston building is south of the Wolf building, and the base line of both buildings is on the building line of the street. . . .

From the pavement to the top of the Livingston building, the distance is thirty-five feet, nine inches, i. e., to level of cornice. To level of cornice on Wolf building, in same manner, is forty-three feet six inches; to top of highest point on Wolf building is forty-six feet nine inches. The width of the Wolf building is twenty-six feet. The distance from pavement to floor of Wolf's veranda is seventeen feet four inches. The length of the veranda corresponds with the width of the Wolf building. The veranda projects upon the street three feet three inches. The bay-windows are situated in the middle of the veranda. That in the second story projects two feet three and one half inches from the building line upon the street; the height of said bay-window is twelve feet four inches. The bay-window on third story projects, in like manner, one foot, eleven and one half inches. The height of this bay-window to top of roof on third story is eleven feet nine inches. The width of the bay-window on second story is seven feet five inches. The width of the third story bay-window is six feet nine inches. From no point within the Livingston building can the bay-window be seen, nor can the veranda be seen from within the Livingston building, on the second story, except that nearest the said veranda. . . .

The evidence further shows that there are in the borough of Carlisle four other bay-windows somewhat similar to the bay-windows on the Wolf building; that none of these were erected prior to the year 1869, and that they are so situated with refer-

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ence to adjacent owners that no peculiar inconvenience is occasioned by them to said adjacent owners; that there are twenty-seven jut windows, more than thirty-five balconies, a large number of permanent and adjustable awnings, signs extending across the footwalk, also many heavy cornices and several hundred trees; and that these enumerated objects are all beyond the building line of the streets of the borough. There is no evidence to show that objection has ever been made to these structures before the present instance. It is the custom of the borough of Carlisle to permit objects of the general kind above enumerated to remain permanently in its streets. No evidence was offered to show the nature and amount of inconvenience occasioned by said veranda and bay-window to Jacob Livingston, further than that which is necessarily to be inferred from the above stated facts, nor is there any direct testimony to show that Mr. Livingston's property is diminished in value by the Wolf projections. . . .

It is further contended on part of the defendant that even though the structures complained of would in the absence of any borough ordinance be of such a nature that Mr. Livingston would obtain relief in equity, yet the borough ordinances afford complete protection to Mr. Wolf. On page 53, Borough Ordinances of Carlisle, § 6, appears the following, passed May 20, 1852:

"If any person or persons shall make any pavement, etc., or if any person shall hereafter make and set up in any street of sixty feet wide or upward any porch, cellar door or steps, which shall extend beyond the distance of four feet three inches into such street, or beyond a proportionate distance, if set up in any narrow street; or, if any person shall make or set up any bulk or jut window which shall extend beyond the distance of twenty-eight inches into the said street, or shall place or cause to be placed any spout or gutter whereby the passage of any street, lane or alley shall be incommoded, and shall fail to remove the same within three days after notice given by the chief or assistant burgess, he, she or they so offending shall forfeit and pay a sum not exceeding five dollars, and for continuance of such offence shall forfeit and pay a sum not exceeding ten dollars."

Section 7, page 93, reads as follows, March 16, 1869:

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"From and after the passage of this ordinance, it shall be unlawful for property owners in said borough to extend into the pavement any cellar doors for a greater distance than three feet nine inches, or any doorsteps to a greater distance than three feet six inches, on any of the streets of said borough."

The veranda does not extend into the street beyond the distance of three feet three inches, nor does either bay-window project into the same beyond twenty-seven and one half inches.

It will be observed that these proceedings were instituted soon after the defendant began the building on which are the projections. The plaintiff has slept upon no right and is entitled to all the consideration that the law gives to the vigilant man. On the other hand, the defendant, relying on his rights in the matter and with a full knowledge of these proceedings, has, as is shown by the amendment to the plaintiff's bill, now almost completed the projections complained of. In these circumstances, a court of equity will interfere as readily and on the same evidence to remove these projections, as it would to prevent their erection. . . .

The rights of property owners along the public highway are nowhere defined with precision. It seems, however, to be the settled law both in this country and in England that in general a recovery may be had in a suit at law in all cases where the legal right of the plaintiff has been invaded by the defendant, even though no actual damage result therefrom. The law will import damage. But when an individual asks an equitable remedy, when he seeks by injunction to restrain another from erecting or maintaining that which is styled a nuisance, something more than the mere invasion of a legal right must be shown. He must of course first show that a legal, or, as it is sometimes called, a substantial right has been invaded, else no matter how great the damage he may suffer from the act or omission of the defendant, he would not have any standing to complain. He must then go beyond this and show that the injury done him is not of a trifling character, but tangible, considerable, and seriously interfering with the enjoyment of his property. Some of the cases even go further, and put it perhaps too strongly by saying that the injury must be irreparable.

At all events, the injury must be of a special, private and

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peculiar character. The mere fact that the object complained of amounts to a public nuisance, does not render it improper for a private individual to seek relief by injunction, if his legal rights have been infringed, and if, in addition to the damage suffered by the public generally, he shows a damage done him of a special and peculiar kind. It is no defence to a wrongdoer to allege that the act complained of inflicts a like injury on a number of persons. The rule is that one erecting or maintaining a common nuisance is not liable to an action at the suit of one who has sustained no damage therefrom, except such as is suffered by the public generally. He is liable at the suit of one who has sustained damage peculiar to himself. No matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to relief therefor. The public nuisance becomes a private one to every person on whom it inflicts such peculiar damage.

The first inquiry, then, will be if any legal right of the plaintiff has been invaded by the erection and maintenance of the defendant's projections; and, secondly, if such legal right has been invaded, if the damage resulting therefrom is of that tangible kind and of that degree which entitles him to call in the extraordinary power of a court of equity to give him relief. The further questions will also be considered, viz.: Whether the borough of Carlisle has power to pass an ordinance or by-law permitting such projections; whether in this instance it has exercised that power and has granted the requisite license, and if so, whether such by-law is reasonable. The law is not that boroughs can license nuisances, but it must be remembered that all obstructions on the streets are not necessarily nuisances. There are certain reasonable obstructions which boroughs can license, and when so licensed neither the public nor an individual has a right to complain. The private right grows out of the public right, and when the public in a proper manner relinquishes that right the private right goes with it.

Mr. Wolf owns the fee to the middle of Hanover street, subject to the public right of way with its necessary incidents. Such is a presumption of law; and there is nothing in the facts of this case which would warrant any other conclusion. It is true that the proprietaries laid out Hanover street for public use and sold the land on either side of it to the building line.

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In such circumstances, the fee to the middle of the street is in the adjacent owners, there being no express or implied reservation in the deed. No instrument which puts the fee in any other person or in the borough of Carlisle has been brought to the attention of the master. [—Citing *Paul v. Carver*, 26 Pa. 227; *Grier v. Sampson*, 27 Pa. 188; *Cox v. Friedley*, 33 Pa. 124; *Trutt v. Spotts*, 87 Pa. 339; *Spackman v. Steidel*, 88 Pa. 458; *Hinchman v. Railroad Co.*, 2 C. E. Green 75 (86 Am. Dec. 252.)] It is not necessary to multiply cases; the principle is well established. In this case, the proprietaries laid out Hanover street as a public highway, and sold the lots on either side of it. They did not reserve to themselves or sell to any other the land in the street. It was laid out for the advantage of the adjacent lots and for public travel; and in reason as well as on authority the master is of opinion that Mr. Wolf owns the fee in the street in front of his house to the middle of the street, subject to the public right of way or travel over it with its necessary incidents.

If, then, Mr. Wolf owns the fee to the middle of the street, as above indicated, let us inquire what right, attaching to Mr. Livingston's building, has been invaded by the defendant in constructing and maintaining these projections. If Mr. Livingston is injured at all it must be in air, light or view. In order to have any standing at all to complain, he must contend that he has a legal right to an unobstructed view across that portion of the highway in which Mr. Wolf owns the fee subject to the public right of way; or, he must have a legal right to have light and air come to his building across the same without any interference. . . .

—Considering *Jenks v. Williams*, 115 Mass. 217; *Higbee v. Railroad Co.*, 19 N. J. Eq. 276; *Commonwealth v. Harris*, 10 W. N. 10; *Blanchard v. Reyburn*, 1 W. N. 529; *Horner v. Craig*, 2 W. N. 11; *Reimer's App.*, 100 Pa. 182; *Wood on Nuisances*, § 9; *Morris etc. R. Co. v. Prudden*, 5 C. E. Green 586; *Attorney General v. Insurance Co.*, 2 Johns. Ch. 378; *Attorney General v. Railroad Co.*, 2 Green Ch. 136; *Hinchman v. Railroad Co.*, 2 C. E. Green 75; *Bigelow v. Bridge Co.*, 14 Conn. 565 (86 Am. Dec. 502); *Irwin v. Dixon*, 9 How. 10; *Zabriskie v. Railroad Co.*, 2 Beas. 314; *Philadelphia's App.*, 78 Pa. 33; *Wilson v. Strawbridge*, 4 W. N. 35; the master continued:

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From the above cases, it is evident that a court of equity will not interfere at the instance of a private suitor to remove an obstruction on the public highway, unless he show a clear violation of a private right and a serious consequent damage. Now, from the interior of the Livingston building no part of the bay-window can be seen unless the window sash be raised, and only a small portion of the veranda is visible. The third story bay-window neither obstructs his view, light or air to any extent, and it is only from the one window in his building that any part of the projections can be seen without raising the sash. Access to his building is not cut off, nor is the distance to be traversed in reaching the Livingston building from any given point increased. His right of passage is in no way interfered with. From the very nature of the projections, it is evident that the diminution of light and air occasioned thereby to Mr. Livingston, is inconsiderable, while the view is far less interrupted than it is by trees along the side of the street. It cannot be possible that the cutting off of a prospect by a bay-window, when it is necessary to raise the sash before that window can be seen at all, is the sort of an injury that is either tangible or considerable. It is rather of that fanciful character which a court of equity would be very slow to enjoin. . . .

—Considering *High on Injunctions*, 292; *Black v. Railroad Co.*, 58 Pa. 249; *Allegheny v. Zimmerman*, 95 Pa. 287; *Commonwealth v. Hauck*, 103 Pa. 536, the master proceeded:

I have found that projections of a character such as this and other obstructions, ornamental, convenient or useful, are permitted upon our streets. Such is the immemorial custom of our borough and the custom is certainly not unreasonable. It is not necessary to determine definitely whether or not these projections are nuisances at common law. If it be doubtful whether they are public nuisances, and if the private right to complain falls, unless they are also public nuisances, then that doubt should be resolved in favor of the defendant and would be conclusive in the present action. It seems to me that there is at least sufficient doubt on this subject to prevent the interference of a court of equity at the instance of a private suitor, until the public rights in matters such as this are more clearly determined at law or otherwise.

I pass, however, from this to the further and last question

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that will be considered, viz.: Are these projections permitted by a lawful borough ordinance or other lawful authority; for if so they would not be public nuisances and consequently could not be private ones. Clearly, the borough ordinance, by imposing a penalty on bulk or jut windows that project into the street beyond twenty-eight inches in streets that are sixty feet wide and upwards,—Hanover is one of these, by implication at least,—allows those that project to that distance. The general term “jut window” is broad enough to include structures like those bay-windows erected by Mr. Wolf: *Commonwealth v. Harris*, 10 W. N. 13. These do not encroach upon the highway beyond the said twenty-eight inches, and are therefore permitted by the ordinance. The ordinance in the same manner permits porches that do not extend into the street more than four feet three inches. The word porch, and the general spirit of the ordinance, cover such a projection as this veranda. This veranda does not project to so great a distance as allowed by the ordinance and is consequently thereby permitted. The ordinance is certainly not unreasonable, and the custom of the borough both before and since the passage of the same, in permitting not only such but even greater encroachments upon its streets, is abundant evidence of this.

It remains, then, to determine whether the ordinance is legal, for if illegal it would of course afford no protection to Mr. Wolf. The control of public streets is in Pennsylvania an incident at common law of municipal corporations; and it does not seem to me that it would be a very great stretch of that common-law power for the borough to pass the ordinance in question. It is a general ordinance intended for the benefit of all the citizens and for the better enjoyment of their buildings and homes. It does not authorize that which is per se a nuisance, nor anything that really materially interferes with public travel or public convenience, and it is certainly not unreasonable in its character. This principle is recognized in several Pennsylvania cases. In *Wartman v. Philadelphia*, 33 Pa. 209, it is held that a municipal corporation has at common law a right to fix the time and place of holding markets. The language of the court is as follows: “It is therefore the common law in Pennsylvania that every municipal corporation, which has power to make by-laws and establish ordinances to promote the general welfare and preserve the

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peace of a town or city, may fix the time and place of holding public markets for the sale of food, and make such other regulations concerning them as may conduce to the public interest. We take this to be the true rule, because it is necessary and proper, in harmony with the sentiments of the people, universally practiced by the towns, and universally submitted to by the residents of the country." In *Denehey v. Harrisburg*, 2 Pears. 332, it is held that the control of the public streets is an incident to nearly all boroughs at common law, provided that control be exercised for the public good, of which the corporate authorities are for the most part the judge. This appears by the judicial decisions of most states, our own among the rest, and it is only in a very gross case that the power of a borough, so exercised, can be controlled or overruled by the courts. This, more especially in a court of equity, so long as the corporate authorities are acting within the scope of their creation and for the apparent benefit of the citizens they represent. The case, *Fisher v. Harrisburg*, 2 Gr. 291, recognizes the authority of a municipal corporation to make sewers without special authority given for that purpose.

But the more important inquiry is whether the borough of Carlisle has expressed or implied legislative sanction in the enactment of this ordinance. Carlisle was incorporated by an act passed April 13, 1782, 2 Carey & B. L. 333. Section 39 of the act of incorporation reads as follows :

"And be it further enacted by the authority aforesaid that if any person or persons shall hereafter make and set up or shall cause to be made and set up, in any street of fifty feet wide or upwards, within the said borough, any porch, cellar door, or step, which shall extend beyond the distance of four feet and three inches into such street, or a proportionate distance into any narrower street, and if any person or persons shall hereafter make and set up, or cause to be made and set up, any bulk, jut window or encumbrance whatsoever whereby any passage of any street, lane or alley shall be obstructed, or shall place or cause to be placed any spout or gutter whereby the passage of any street, lane or alley shall be incommoded, every person so offending and being thereof convicted before the burgesses of the said borough or either of them, or before any justice of the peace of the county aforesaid, shall for every such offence

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forfeit and pay the sum of thirty shillings, and shall forthwith remove the said nuisance or cause the same to be removed.” The eleventh section of same grants the borough power to make rules and ordinances not inconsistent with the laws of the commonwealth, necessary or convenient, for the good of the borough.

The general borough act passed April 3, 1851, defines the power of boroughs thereafter incorporated. The thirty-third section of the act provides that any borough heretofore incorporated may, upon application to the Court of Quarter Sessions, become subject to the restrictions and possess the powers and privileges conferred by this act, “provided, that upon such application being confirmed by the said court the provisions of the former charter shall be annulled by the decree of the court so far as they are in conflict with the provisions of this act.” Carlisle was incorporated before the passage of this act. On the 14th day of April, 1852, application having been previously made to the Court of Quarter Sessions to have the provisions of the act of April 3, 1851, extended to Carlisle, it was so decreed, and that all the provisions of the former charter “of said borough, so far as they conflict with the provisions of the said act, be annulled.” The act of 1851 gives boroughs the power to regulate their streets and all needful jurisdiction over the same. This does not directly give the boroughs authority to permit projections in the street, but it gives them certain discretionary power over the streets, which power when reasonably exercised will not readily be interfered with by the court. The original charter is annulled only in so far as it is inconsistent with the act of 1851. The charter by clear implication allows jut windows that do not obstruct or incommode the passage of any street, lane or alley, and porches that do not extend into the streets fifty feet wide and upward beyond four feet three inches. The master has already given his opinion on the interpretation that ought to be put on the words “jut window” and “porch,” and thinks that they include respectively projections such as this bay-window and veranda. There is nothing in the act of 1851 annulling these provisions of the charter, and they are therefore applicable to the borough to-day: *Harrisburg v. Sheck*, 104 Pa. 58. This window does not obstruct or incommode passage, and the veranda does not project into

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the street beyond four feet three inches. The master thinks they are permitted by lawful authority, which furnishes protection to Mr. Wolf in this action.

The master would therefore respectfully recommend to the court that the bill be dismissed at the cost of the plaintiff.

To the foregoing report the plaintiff filed exceptions alleging that the master erred, *inter alia* :

6. In finding and ruling that the plaintiff had suffered no injury which entitled him to the relief sought in this action.⁵

7. In ruling that the structure of the defendant was not a nuisance *per se*.⁶

8. In ruling that the borough of Carlisle could permit or authorize a nuisance, and that the defendant was protected by the ordinances of said borough.⁷

9. In ruling that the structure of the defendant was "permitted by lawful authority which furnishes protection to Mr. Wolf in this action."⁸

10. In ruling and recommending that the bill should be dismissed at the cost of the plaintiff.

Said exceptions having been argued before BARNETT, P. J., 41st district, holding special term, an opinion was filed wherein, after considering *Pierre v. Fernald*, 26 Me. 486 (46 Am. Dec. 573); *Hazlett v. Powell*, 30 Pa. 296; *Haverstick v. Sipe*, 33 Pa. 371; *Rennyson's App.*, 94 Pa. 147; *Tinicum Fishing Co. v. Carter*, 61 Pa. 42; *Parker v. Foote*, 19 Wend. 318; *Hinchman v. Railroad Co.*, 2 C. E. Green 75 (86 Am. Dec. 258); *Commonwealth v. Harris*, 10 W. N. 10; *Reimer's App.*, 100 Pa. 182; *Philadelphia's App.*, 78 Pa. 39, the exceptions to the master's report were dismissed and the report confirmed. A final decree having been entered dismissing the bill, the plaintiff took this appeal, specifying that the court erred, *inter alia* :

5-8. In dismissing the plaintiff's exceptions.^{5 to 8}

11. In decreeing the dismissal of plaintiff's bill.¹¹

Mr. W. J. Shearer (with him *Mr. F. E. Beltzhoover* and *Mr. S. Hepburn, Jr.*), for the appellant:

1. Is a permanent structure, built over the highway, but

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seventeen feet above it, a public nuisance? This question is fully answered by Reimer's App., 100 Pa. 182. Such a structure is a nuisance per se. In the case cited, the projection was about the same as in the case at bar; and there was a special permission to erect it, which, because it was special, was void. In the present case there was no permission from the borough of Carlisle, and the borough has no power to permit or authorize a nuisance. By the general borough law, under which the borough of Carlisle is incorporated, it can "prohibit and remove obstructions in the highways," but cannot legalize them.

2. As Hanover street was laid out by the Penns, the owners of the soil, and as the lots, sixty by two hundred and forty feet, were sold as lots fronting on an eighty foot street and as marked on and part of a certain general plan which is recited in all the deeds, the dedication by the vendors was complete and irrevocable. Every purchaser of a lot, therefore, bought the right to an open street eighty feet wide, with all the conveniences, pleasures, luxuries, if you choose, which that right implies, and took subject to the same right in every purchaser. And the findings show that the plaintiff is affected by these structures in a way and to an extent that no other except one person can be affected; and there is no way to enforce or protect his right except by an injunction.

Mr. A. D. B. Smead and Mr. William Trickett (with them *Mr. John B. Landis*), for the appellee:

I. The Wolf structures are not public nuisances.

1. (a) The legislature can legalize what would otherwise be a public nuisance: *Wartman v. Philadelphia*, 33 Pa. 202, 210; *Commonwealth v. Reed*, 34 Pa. 275; *Ensworth v. Commonwealth*, 52 Pa. 320; *Paul v. Carver*, 24 Pa. 207, 211; *Higbee v. Railroad Co.*, 19 N. J. Eq. 276; and this power was not taken away by the constitution of 1874: *McGee's App.*, 114 Pa. 470, 477. (b) The legislature has directly authorized bay-windows in Carlisle: Incorporating act of April 13, 1782, 2 Carey & B. L. 333; § 33, act of April 13, 1851, P. L. 327; act of February 18, 1769, 1 Carey & B. L. 488; *Philadelphia's App.*, 78 Pa. 33, 36; *Carlisle v. Baker*, 1 Y. 471; *Horner v. Craig*, 2 W. N. 11; *Garrett v. James*, 65 Md. 260.

2. (c) If the charter of Carlisle were repealed by subsection

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to the general borough act of 1851, the borough still has power to legalize structures of the general class now in question, within reasonable limits, by general ordinances: Act of April 3, 1851, § 2, I., III., IV., XIII., P. L. 320, 321; Commonwealth v. Kepner, 1 Pears. 184; Clifford v. Dam, 81 N. Y. 52; Barter v. Commonwealth, 3 P. & W. 259; Fisher v. Harrisburg, 2 Gr. 291; Commonwealth v. Wentworth, 4 Clark 324; Denehey v. Harrisburg, 2 Pears. 330; Strawbridge v. Philadelphia, 2 Penny. 419, 428; Kneidler v. Norristown, 100 Pa. 368; Commonwealth v. Harris, 10 W. N. 11; Reimer's App., 100 Pa. 182; Philadelphia's App., 78 Pa. 33, 39; Smith v. Simmons, 103 Pa. 32; Paul v. Carver, 26 Pa. 223, 225; Commonwealth v. Hauck, 103 Pa. 536. (d) The borough of Carlisle has authorized the structures by its ordinances.

II. Do the structures, if a nuisance to the public, inflict special damage upon the plaintiff?

1. The plaintiff does not clearly allege any damage, except obstruction of view from windows of his dwelling. But, obstruction of view is not an infringement of any of plaintiff's rights: Wood on Nuisances, §§ 8, 13; Bliss v. Ball (shade trees), 99 Mass. 597; Sargent v. George, 56 Vt. 627; Knickerbocker Ice Co. v. Shultz, 116 N. Y. 382; Garrett v. James, 65 Md. 260; Jenks v. Williams, 115 Mass. 217. And a private relator must show damage that is (a) special: High on Injunctions, § 522; Bispham's Eq., § 443; Mechling v. Bridge Co., 1 Gr. 416; Phila. etc. Ry. Co.'s App., 102 Pa. 123, 130; Buck Mountain Coal Co. v. Navigation Co., 50 Pa. 91, 100; Sparhawk v. Railway Co., 54 Pa. 401; Black v. Railroad Co., 58 Pa. 249; Cox v. Railroad Co., 10 W. N. 552; s. c. 11 W. N. 571; Knickerbocker Ice Co. v. Shultz, 116 N. Y. 382; Higbee v. Railroad Co., 19 N. J. Eq. 276, 279; Jenks v. Williams, 115 Mass. 217. (b) It must be material, that is, real and considerable: Walters v. DeSelfe, 4 De G. & Sm. 222; Sparhawk v. Railway Co., 54 Pa. 401, 427; High on Injunctions, § 552; Philadelphia's App., 78 Pa. 33; Zabriskie v. Railroad Co., 2 Beas. 314, 318; Hinchman v. Railroad Co., 17 N. J. Eq. 75, 78, 81 (86 Am. Dec. 253).

OPINION, MR. JUSTICE WILLIAMS:

The principle that matters of merely local concern should be

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left to the control of the people to be affected, is recognized and acted upon in our system of government. To this end cities and boroughs have their legislative as well as their administrative officers, and the municipal legislature may make laws in regard to all subjects of a municipal character, and enforce them by appropriate penalties. The local government must keep within the limits that bound its jurisdiction as they are defined by the constitution and laws of the state; but, subject to these restrictions, it may determine what is best calculated to promote the security, the comfort, and the convenience of the inhabitants. Among the subjects of municipal control is that of the opening, vacating, and management of streets and alleys. The city or borough may decide when and where it will open streets, what shall be their width, and how much of that width shall be devoted to a carriage way, and how much to footwalks. It may say where trees shall be planted within the street limits, where and how hitching posts shall be set, telegraph poles erected, or passenger railways built. Its decision in such matters may subject a few persons to some inconvenience, or possibly to some substantial loss, but it has the power to decide on such subjects. The foot ways no less than the carriage ways are under municipal control, and the authorities may determine the extent to which the walks and pavements may be obstructed by cellar doors, door-steps, awnings, projecting windows, cornices, and the like. This power must be exercised by regulations that are general and uniform, that are reasonable and certain, and that are in conformity with the constitution and laws. When so exercised, it is binding on all the inhabitants of the municipality. These general propositions are supported by many cases, among which are *Paul v. Carver*, 26 Pa. 223; *Commonwealth v. Rush*, 14 Pa. 186; *Barter v. Commonwealth*, 3 P. & W. 259; *Philadelphia's App.*, 78 Pa. 33; *Allegheny v. Zimmerman*, 95 Pa. 287; *Commonwealth v. Hauck*, 103 Pa. 536; *In re Ruan St.*, 132 Pa. 257. That the courts must judge of the reasonableness of the action of the municipality, and that such action is not binding, if it is unreasonable, was held in *Kneedler v. Norristown*, 100 Pa. 368; and that its action must be general, bearing equally upon the citizens, was ruled in *Reimer's App.*, 100 Pa. 182.

In this case, the obstruction complained of is a window pro-

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jecting from the second story of defendant's dwelling into the street. The plaintiff alleges that the obstruction is unlawful, and asks that it may be prevented by an injunction. The defendant sets up a borough ordinance as his authority for building the window, and denies that it inflicts any substantial injury upon the plaintiff. The controlling question, therefore, is whether the borough of Carlisle has authorized the construction of the window. If it has, the decree appealed from was rightly made. If it has not, then the extent of the plaintiff's injury, and the other questions raised, must be considered.

It is not denied that an ordinance was duly passed by the borough council on the 20th May, 1852, relating to this subject. It provided, among other things, that all porches, cellar doors, and door-steps should be so built as not to extend into any street, having a breadth of sixty feet, beyond four feet three inches, or a proportional distance in narrower streets. It also prohibited the construction of "any bulk or jut window" projecting into the street more than twenty-eight inches. In 1869 this ordinance was amended so as to reduce the distance that a cellar door might extend into the street to three feet and nine inches, and that for door-steps to three feet and six inches; but the provision for "bulk or jut windows" remained at twenty-eight inches. The master finds that the defendant's window extends but twenty-seven and one half inches over the street line. It is therefore within the limit fixed by the ordinance, and, as to the public, within its protection. It is true the ordinance does not expressly declare that lot owners may occupy three feet and nine inches of the street with their cellar-ways, or project their jut or bay-windows to a distance of twenty-eight inches over the street; but, by forbidding the extension of such structures beyond a fixed limit, it does, by clear and necessary implication, permit their erection within that limit. The window is therefore not an unlawful obstruction of the street, but a projection authorized by the ordinance of 1852.

In Reimer's Appeal, *supra*, an injunction was granted restraining the erection of a projecting window, but it was because no valid municipal authority was shown for building it. An individual permit had been granted, but it was held that the use of the streets for such purposes must be regulated by rules of

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general and uniform application. The power to make such rules was not denied, but was clearly recognized. The principles that control this case may be stated thus:

1. Cities and boroughs have the power to permit, under regulations that are reasonable in character, and general in their application, the use of a portion of the highways for approaches to and for ornamental work upon buildings standing on the street line.

2. The borough of Carlisle has exercised this power by the ordinance of 1852, which is reasonable in its provisions, and general in its application.

3. The window complained of is within the limit of projection fixed by the ordinance, and it is consequently within its implied permission.

It follows that the projecting window is not an unlawful obstruction, but a lawful structure. If this conclusion could be regarded as doubtful, the decree ought nevertheless to be affirmed upon the finding of the master that the window caused no appreciable injury to the plaintiff.

The decree is affirmed; the costs to be paid by the appellant.

ESTATE OF S. B. KIEFFER, DECEASED.

APPEAL BY ANNIE BUCHER FROM THE ORPHANS' COURT OF CUMBERLAND COUNTY.

Argued April 29, 1890—Decided October 6, 1890.

Where a conveyance is made to two persons as grantees, there is a presumption, in the absence of an express agreement otherwise, that each one takes an undivided moiety of the property; and, in such case, if either grantee has furnished more than one half the purchase money, the other is indebted to him in an amount necessary to equalize their respective investments.

Before PAXSON, C. J., STERRETT, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 275 January Term 1890, Sup. Ct.; court below, number and term not given.

Statement of Facts.

On May 14, 1889, Catharine E. Kieffer, administratrix of S. B. Kieffer, deceased, filed her first and final account, which was referred to *Mr. Duncan M. Graham*, as auditor, to report a distribution.

At the hearing before the auditor, Mrs. Annie Bucher, the sister-in-law of the decedent, presented an agreement under seal, executed by the decedent and herself, which was as follows :

"Whereas, Dr. S. B. Kieffer and Mrs Annie Bucher are the owners of the house and lot of ground situate in Carlisle, Pa., purchased by them from John H. Wolf and wife and particularly mentioned and described by said Wolf and wife in their deed to said Dr. S. B. Kieffer and Mrs. Annie Bucher, dated the 10th day of October, A. D. 1884, and recorded ; and said grantees, being desirous of fixing the amount of interest of said Mrs. Annie Bucher in the said property, which has been greatly enlarged and improved since their purchase, and also being desirous of fixing a sum upon which interest shall be semi-annually paid by the said Dr. S. B. Kieffer to said Mrs. Annie Bucher, and also such instalments as she will be willing to receive from said Dr. S. B. Kieffer in order to pay and reduce the amount upon which he pays interest, as well as to fix the price and payments at which he may elect to purchase and pay for said Mrs. Bucher's interest in said property: Now, this agreement witnesseth, That it is hereby covenanted and agreed by and between the said Dr. S. B. Kieffer and Mrs. Annie Bucher that the interest, share or purpart of said Mrs. Annie Bucher, in the aforesaid described and improved lot of ground conveyed by the said John H. Wolf and wife to the said contracting parties, shall be and is now fixed at five thousand dollars; and, inasmuch as the said premises are occupied by the family of the said Dr. S. B. Kieffer, and by the said Mrs. Annie Bucher, her brother Henry and sister Emma, in common, the said Dr. S. B. Kieffer hereby agrees to pay to the said Mrs. Annie Bucher, her heirs or assigns, the interest on three thousand dollars, semi-annually, regularly and promptly, commencing on the 1st day of January, 1886; and if the said S. B. Kieffer shall at any time elect to pay the said Mrs. Annie Bucher the said sum of three thousand dollars, or any part of it, in payments of not less than three hundred dollars at a time,

Statement of Facts.

the said Mrs. Annie Bucher agrees to receive the same, and the interest on each payment as made shall cease and determine, and each payment shall be so much paid on account of the purchase money for the said Mrs. Annie Bucher's interest or estate in the aforesaid property; and when the valuation of five thousand dollars is paid to her or her executor, administrator or assigns, she hereby agrees to execute and deliver a deed in fee-simple to the said Dr. S. B. Kieffer, his heirs or assigns, for her whole estate or interest in the said property. The said Dr. S. B. Kieffer hereby agrees to pay all the taxes assessed upon the whole of said property, and all water and gas bills which may be charged upon it.

"In witness whereof we have hereunto set our hands and seals this day of December, 1885."

On the back of the agreement was indorsed an unsigned memorandum, as follows:

"Mrs. Annie Bucher having withdrawn five hundred dollars of the three thousand dollar fund upon which Dr. S. B. Kieffer under this agreement agrees to pay to her the annual interest, the parties to said agreement now change and alter the same so as to reduce that sum of three thousand dollars where stated on the second page, on the 26th line of it, to twenty-five hundred dollars instead of three thousand dollars; and the said Dr. S. B. Kieffer covenants and agrees to pay to Mrs. Annie Bucher interest on the sum of twenty-five hundred dollars as is stated in the body of the said agreement, and in all other respects the agreement to remain unchanged.

"Witness our hands and seals this second day of April, 1886.

"Witness:

[Seal.] "

"[Seal.] "

The claimant, with the foregoing documentary evidence, proved by witnesses that about the time of the purchase of the Wolf property, on October 10, 1884, for the consideration of \$4,500, she paid over to Dr. Kieffer \$5,000, which had been collected for her from a life insurance company on a policy upon the life of her husband, then deceased. It was conceded that \$500 had been repaid to her, and the balance, to wit, \$4,500, with interest, she claimed against the estate of the decedent as a loan. It also appeared that in April, 1886, Dr. Kieffer had mortgaged his undivided one half interest in the

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property to Emma C. Thompson, for \$1,500; and, his estate being insolvent at his death, his one half interest in the property had been sold by the accountant at an Orphans' Court sale for the payment of debts, and Mrs. Bucher became the purchaser thereof for \$1,700.

The auditor, upon objection made by other creditors of the estate, disallowed the claim of Mrs. Bucher, on the ground that the agreement in evidence established merely an option in Dr. Kieffer to purchase the claimant's interest in the property at a fixed price, which option he had never exercised; and he reported accordingly.

Exceptions filed by the claimant to the auditor's report having been argued, the court, SADLER, P. J., on January 1, 1889, filed the following opinion:

The agreement between the decedent and Mrs. Bucher of December, 1885, was for the expressed purpose of fixing the amount of interest of Mrs. Bucher in the house and lot of which they were joint owners, and also to fix the sum at which he, Dr. Kieffer, might purchase her interest, and the sum he should pay her annually by reason of her interest being in excess of his. The option to purchase was not exercised. That Mrs. Bucher contributed to the purchase and improvement of the property occupied by them a much larger sum than Dr. Kieffer, I am well satisfied; but I think that it was intended that she should be treated as owning more than an undivided half of the property by reason thereof, rather than his creditor. The interest of Dr. Kieffer was not so large as hers; what it was, was sold; no more could be disposed of by his administrator. The auditor was right in refusing to allow the claim of \$4,500, made by Mrs. Bucher.

—A formal decree having been signed confirming the distribution reported by the auditor, the claimant took this appeal, specifying that the court erred in "dismissing the exception to the auditor's report, and in rejecting the claim of Mrs. Annie Bucher for \$4,500."

Mr. A. B. Sharpe and *Mr. S. Hepburn*, for the appellant.

Mr. E. W. Biddle and *Mr. J. W. Wetzel*, for the appellee.

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OPINION, MR. JUSTICE STERRETT:

This contention involves the construction of the nondescript paper given in evidence by appellant, and in regard to the meaning of which learned counsel differ so widely.

It appears from the evidence that in October, 1884, John H. Wolf and wife conveyed to appellant and her brother-in-law, Dr. S. B. Kieffer, since deceased, a lot of ground in the borough of Carlisle, for the consideration of \$4,500. This is doubtless the same property that is referred to in the preamble to the paper in question. In the absence of any evidence to the contrary, the presumption is that the grantees, named in the deed of Wolf and wife, each acquired title to an undivided moiety of the lot described therein; and that presumption is strengthened by the fact that in April, 1886, Dr. Kieffer made a mortgage of his undivided half of same lot to Emma C. Thompson as security for \$1,500. In 1888, after the decease of Dr. Kieffer, his undivided moiety of the property was sold by his administratrix, under an order of the Orphans' Court, and conveyed to appellant for the consideration of \$1,700. It was also shown that appellant, in 1884, furnished the sum of \$5,000, for the purpose of purchasing and improving the property. It does not appear how much or whether anything was furnished by Dr. Kieffer. If the sum of \$5,000 paid by appellant was more than one half of the amount expended in the purchase and improvement of the property held by them as tenants in common, as it doubtless was, it would follow that Dr. Kieffer was indebted to appellant in an amount necessary to equalize their respective investments.

Considering the paper referred to in the light of the facts and circumstances which appear to have been connected with the acquisition and ownership of the property to which it relates, we are of opinion that it was intended by the parties thereto to specify, first, the amount of appellant's contribution to the purchase of the joint property; second, the amount necessary to be paid by Dr. Kieffer in order to equalize their respective investments therein; and, third, to secure to him the option of purchasing appellant's undivided half interest in the property, by paying her the amount she had expended in the purchase and improvement of the property. The paper accordingly declares that the interest of appellant "in the aforesaid de-

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scribed and improved lot of ground, conveyed by the said John H. Wolf and wife to the said contracting parties, shall be and is now fixed at five thousand dollars." This was not intended as a declaration that appellant was entitled to either more or less than an undivided moiety of the property, but merely that she had contributed that sum to the purchase and improvement thereof. The agreement also provides that Dr. Kieffer shall pay appellant "the interest on three thousand dollars, . . . commencing on the 1st day of January, 1886," and if at any time he wishes to pay her the said sum of \$3,000, or any part thereof, in payments of not less than \$300, at any one time, she shall accept the same, and thereupon interest on the amount so paid shall cease, etc. It does not appear how the sum of \$3,000 is made up, but it is evidently treated as an indebtedness by Dr. Kieffer to appellant, which he has a right to pay and she is bound to receive in instalments of not less than \$300 each. It cannot possibly refer to anything else than an item of indebtedness, the sum which he is required to pay in order to equalize their respective investments in the property. It is conceded that he did pay her \$500 on account, and thereby reduced the amount to \$2,500. The sum thus paid on account is doubtless the same that is mentioned in the unsigned indorsement which appears on the paper in question. The option to purchase appellant's interest in the property for \$5,000 was never exercised by Dr. Kieffer, and is therefore not an element in this case.

The legitimate inference from all this is, that at the time of his death, in 1887, Dr. Kieffer was indebted to appellant in the sum of \$2,500, with arrears of interest, for moneys advanced by her over and above her half or share of the purchase money and costs of improvement; and, as a creditor of his estate to that extent, there appears to be no good reason why she should not be permitted to participate in the fund for distribution.

Decree reversed; and it is ordered that the record be remitted with instructions to distribute the fund in accordance with the foregoing opinion.

F. F. BUSHEY v. SOUTH MOUNT. M. & I. CO.

APPEAL BY DEFENDANT FROM THE COURT OF COMMON PLEAS
OF CUMBERLAND COUNTY.

136	541
203	'550
136	541
e204	'284
e204	'284

Argued April 30, 1890—Decided October 6, 1890.

[To be reported.]

1. The delivery of a patent for a tract of land by the commonwealth is an admission that all previous formalities and requisites have been complied with, and passes the title to the grantee. The patent is therefore evidence, *prima facie*, of a survey and return in accordance with the description contained in it.
2. A plaintiff having shown an application for land, a warrant issued thereon, and a patent to his grantor for the land described in the warrant, has a *prima facie* case on which he may rest without showing the return of the survey, made under the warrant, into the land office.
3. The rule that, after the lapse of twenty-one years, the law presumes that a survey regularly returned was made as returned, cannot locate a survey until some monument of it can be found on the ground. Whether such marks exist is a question of fact. If one or more such marks be found, the law will locate the survey by the aid of the legal presumption.
4. If the monuments called for are the lines of older tracts, as adjoiners, such older tracts must be located, before the legal presumption can be invoked; but, as soon as one or more of the tracts called for is located, the presumption can be resorted to to close the survey.
5. If the survey call for marks or other monuments upon its own lines or at its corners, and for adjoiners, and the marks when found are inconsistent with the calls for adjoiners, the marks must prevail, as they are the official foot-prints of the surveyor on the ground: *Grier v. Coal Co.*, 128 Pa. 74; *Bloom v. Ferguson*, 128 Pa. 362.

Before PAXSON, C. J., STERRETT, WILLIAMS, MCCOLLUM
and MITCHELL, JJ.

No. 367 January Term 1890, Sup. Ct.; court below, No. 336
April Term 1887, C. P.

On March 27, 1887, F. F. Bushey brought trespass *q. c. f.*

Statement of Facts.

against the South Mountain Mining & Iron Company, to recover for timber cut and removed by the defendant from the plaintiff's lands. The pleas were *liberum tenementum* and not guilty.

At the trial on November 29, 1889, the plaintiff, as evidence of title to the lands upon which the alleged trespass was committed, put in evidence a certified copy, from the office of the Secretary of Internal Affairs, of an application by William Morrison, dated January 22, 1848, for 100 acres of land "adjoining lands of Benjamin Blackford on the west, Robert Duncan on the north, John Dixon on the east, and the Adams county line on the south;" also a certified copy of the warrant issued upon said application, dated the same day and with the same description. The plaintiff then offered a paper, purporting to be a copy of the original survey under said application and warrant, with proof that it was in the handwriting of Abraham Lamberton, the county surveyor for Cumberland county in 1853, now deceased; that since it was delivered to William Morrison it had been in his possession and that of his grantees down to the plaintiff, and that the marks and calls mentioned in said copy existed on the ground; this, as evidence that said warrant had been executed and returned to the land office; also, the patent of the commonwealth, to A. F. Gitt, dated March 17, 1874; to be followed by deeds carrying the legal title to 24 acres and 57 perches of the tract, being the land in dispute, from William Morrison through A. F. Gitt to the plaintiff.

The defendant objected to these offers, that the copy of the survey offered was unofficial, and that without an official survey and return thereof the patent of the commonwealth was without support and conveyed no title which could be carried by the conveyances to the plaintiff.

By the court: Taken as a whole, we think it is evidence of title in the plaintiff; exception.¹ *

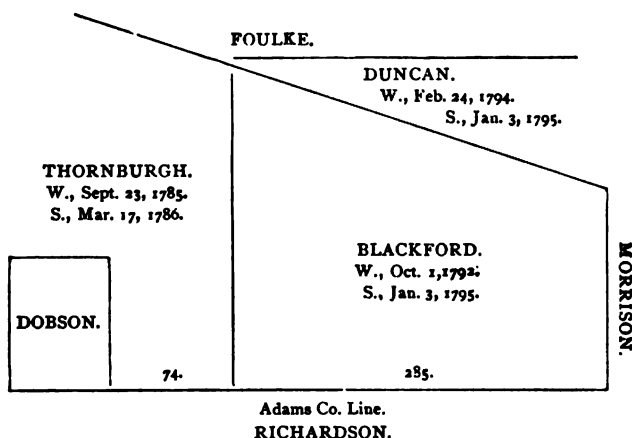
The plaintiff then followed with the testimony of clerks, from the office of the secretary of internal affairs, showing searches for the original return of the warrant of survey issued January 22, 1848, and that it could not be found, but that entries upon the books of the office, certified copies of which were produced, showed the issuance of the warrant on its said

* See order made at beginning of the charge to jury.

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date, and that a "return for patenting" had been made in the usual manner on March 17, 1874, the "acres returned" being 49 acres 27 perches.

The plaintiff having rested, the controversy which followed may be illustrated by the following plan, drawn however without regard to the actual courses and distances shown by the office drafts.



The cutting of the timber in the quantity and in the place claimed by the plaintiff was not disputed, the only question in controversy being as to where the Blackford, called for by the Morrison on the west, was located on the ground, and whether its lines as so located embraced the place where the timber was cut.

The southeast corner of the Dobson improvement, the eldest of the surveys as to which there was testimony, was known and admitted. The point where the east line of the Thornburgh, which was surveyed on March 17, 1786, on a warrant dated September 23, 1785, and called for by the Blackford, which was surveyed January 3, 1795, on a warrant dated October 1, 1792, struck the Adams county line, at a chestnut there called for, was disputed by the testimony. The distance of the foot of this line from the Dobson improvement, as given by the Thornburgh survey, was 74 rods east of the southeast corner of the Dobson; yet the plaintiff claimed from the testimony adduced that no chestnut, (nor the remains of one), was

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found at that distance from the Dobson, but was found at a less distance, to wit, 24 rods east of the southeast corner of the Dobson, and that the call for 74 rods was doubtless a mistake in the figures for 24 rods. The length of the south line of the Blackford from the foot of the east line of the Thornburgh, wherever the latter was, to the southeast corner of the Blackford, where there was a call for a pine tree, was admitted to be 285 rods; so that if the foot of the east line of the Thornburgh was at the point claimed by the defendant, to wit, 74 rods east of the southeast corner of the Dobson, then the timber cut by the defendant was upon the Blackford, and the plaintiff could not recover. On the other hand, if the foot of that line was put 50 rods nearer to the Dobson when it was located, the timber cut was upon plaintiff's tract, and he was entitled to a verdict in his favor.

At the close of the case, on motion of the defendant, the court, SADLER, P. J., withdrew from the jury the consideration of the draft alleged to be in the handwriting of Abraham Lambertson, and the testimony of certain witnesses as to the location of the lines and corners of the said draft on the ground, and charged the jury in part as follows:

In order to recover, it is incumbent upon the plaintiff to show possession of the premises, or title to the same. His claim of title to the land, from which the timber was taken, is founded on the application for a warrant granted by the commonwealth to William Morrison, bearing date January 22, 1848. Through conveyances of Morrison and wife and their grantees, the portion of land in dispute, consisting of three acres and seventy-three perches vested in F. F. Bushey, the plaintiff, who became a grantee. A patent was granted for this land, on March 17, 1874, to A. F. Gitt, which includes the land in dispute.

The defendants are the owners of a number of tracts of land in the neighborhood of where the timber was cut, and they insist that the land on which it stood is included within one which was patented to Benjamin Blackford on a warrant dated October 1, 1792, and which was surveyed on January 3, 1795. It also appears that a warrant was taken out for the Thornburgh on September 23, 1785, and survey made March 17, 1786; and one by Duncan on February 24, 1794, and survey made Janu-

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ary 8, 1795, the former lying on the west and the other on the northeast. These become important matters for consideration, from the fact that the Thornburgh is the older survey, and is called for by the Blackford on the west, and the other was surveyed on the same day and adjoins the Blackford, the division line extending up to the end of the disputed line.

The matter for your determination will be to ascertain, if you can, with reasonable certainty, the location of the Blackford survey, and whether or not it includes the land claimed by F. F. Bushey, on which the timber was cut. In passing upon this question, you must be controlled by certain rules which have been settled by the ultimate legal tribunal of this state, as follows:

It is declared that a junior survey must give way to a senior one. It is the rule that, where a warrant is located on the ground and duly returned, it has precedence over subsequent applications for warrants on which surveys may be made, or even for which patents may be granted. So, although the junior survey may, as is often the case, include a part of an older survey, it does not give any title to the older, even if a patent happens to be granted by the commonwealth. Again; in ascertaining the boundaries of a tract of land, the marks of the survey on the ground are paramount and controlling, and in the absence of marks, calls in the deed or grant for natural or artificial boundaries are to prevail over courses and distances. If there be neither evidence of actual survey, that is, the boundaries traced, marked lines, not calls, then the courses and distances are to govern. That is, if all evidence of lines run on the ground are gone, and the boundaries named in the drafts remain, then the courses and distances run must control you. Where monuments and corners are to control courses and distances of a survey, that is, limit the lines or change the courses and distances, it should appear to the satisfaction of the jury that they were of about the same age as those on the original survey which it is proposed to limit or control by these monuments or calls. . . .

The southern line of the Blackford is identical with that of the line dividing the counties of Cumberland and Adams. According to the official survey it is 285 perches in length. It is conceded that the Blackford commences at and is bounded by

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the Thornburgh on the west. The drafts, official and otherwise, show that the former, the Blackford, extends eastwardly the said distance of 285 perches from the Thornburgh. Where this line begins and where it terminates is a most important if not the chief consideration in the present case.

The defendant insists that the eastern line of the Thornburgh is 74 perches distant from the Dobson improvement, and that this is the dividing point between the Blackford and Thornburgh; and that by giving the Blackford the distance marked on the official draft and survey, 285 perches, it extends eastwardly to a point which includes the Morrison tract and the land of Bushey, and that the Blackford warrant, survey, return of survey and patent, being much older than that of Morrison, it has priority over the latter and must prevail against the title of the plaintiff who claims through said Morrison. . . . On the other hand, the plaintiff contends that the true point to start the Blackford is farther west, and at a point where the division line between the Thornburgh and Blackford, as run by surveyors employed by him, intersects the county line.

—Having reviewed the testimony of the parties respectively as to surveys made for them, in search of the lines and corners of the Blackford, the court answered certain points for instruction as follows :

The plaintiff requests the court to charge :

1. The warrant of January 22, 1848, and survey thereon by Abram Lamberton, deputy surveyor for Cumberland county, now lost, but returned June 14, 1858, as evidenced by the records of the land office, and the patent deed of March 17, 1874, place the title of the commonwealth to the 49 acres and 27 perches, therein described, in A. F. Gitt; and the intermediate conveyances in evidence vested the title to the 3 acres and 37 perches, on which the timber was cut, in the plaintiff, unless the locus in quo was within the lines of the Blackford survey; and if the jury believe it was not within these lines, the plaintiff is entitled to recover.

Answer: We are of the opinion that the warrant of January 22, 1848, taken in connection with the patent of March 17, 1874, placed the title of the commonwealth to the 49 acres and 27 perches in A. F. Gitt, and the intermediate conveyances in evidence vested such a title to the 3 acres and 37 perches, on

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which the timber was cut, in the plaintiff; that, unless the locus in quo was within the lines of the Blackford survey, and if the jury believe that this land was not within the lines of the said Blackford, there may be a recovery by him.⁶

The defendant requests the court to charge:

1. The corner of the Dodson improvement being well known, and the location of the Joseph Thornburgh being fixed by that improvement, the proper way to ascertain the location and extent of the Blackford is to begin at the southeast corner of the Thornburgh, that is, 74 perches east of the Dobson improvement, and then measure the full line of the Blackford, 285 perches, eastward; and the Blackford is entitled to this full length, and this measurement would place the lines of the Blackford beyond any cutting done by defendant, and plaintiff cannot recover.

Answer: We are of the opinion that Blackford is entitled to have the full length of the line, to wit, 285 perches, under the testimony in the case. It appears to be conceded that the Dobson improvement is well known, and that the Thornburgh is fixed by this improvement. It is entirely proper, in ascertaining the location and extent of the Blackford, to begin at the southeast corner of the Thornburgh on the county line, and this will be 74 perches east, unless this distance is controlled by improvements on the ground. The plaintiff asserts that such is the case, and the official courses and distances of the Thornburgh and Blackford run from the acknowledged corner of the Duncan, Blackford, Thornburgh and Foulke. The point where the Thornburgh terminates and the Blackford commences is in dispute between the parties, plaintiff and defendant. The defendant insists that this was 74 perches from the Dobson Improvement, while on the other hand the plaintiff contends that the testimony establishes the fact that it was about 50 perches less. Where the southern line of the Thornburgh intersects the county line, we leave for your determination.³

3. The copy of the paper, in the handwriting of Abram Lamberton, is an unknown, unofficial draft, which will not give title, or justify a patent to be issued upon it; and the patent in evidence, being granted upon the deed to Gitt described from an unofficial survey, was granted without right and gives no

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title as against the defendant, the owner of the Blackford, so as to support an action of trespass.

Answer: The Lamberton draft will not give title; but we refuse to instruct you that the patent was granted without right, and that it gives no such title to the plaintiff as to enable him to support an action of trespass against the owner of the Blackford, if the land in dispute was not included within the limits of the Blackford, as contended for by the plaintiff.³

4. The Morrison application and warrant calling for the Blackford on the west, when officially located by a proper survey, must necessarily be surveyed east of the Blackford line, and so as not to interfere with the Blackford title. As no official survey was ever made on this Morrison warrant, and laid on the ground in controversy, so as to conflict with the Blackford line, or title to the Blackford land, there can be no recovery by the plaintiff in this action.

Answer: The Morrison, calling for the Blackford on the west, it must be located east of the latter; and, if it conflicts with the Blackford, which is the elder, and the land in controversy lies on the Blackford, there can be no recovery in this action.⁴

5. The deed from Morrison and wife to Gitt, dated in 1864, conveying the land by courses and distances, as described in it and taken from an unofficial survey, did not convey a legal title to the land to Gitt such as would enable him or his grantee to maintain this action of trespass; and, as the patent does not locate the land, but only defines what it contains when properly located, it furnishes no additional legal right to the plaintiff to maintain trespass, and he cannot recover.

Answer: We refuse to affirm the point as stated.⁵

The jury rendered a verdict in favor of the plaintiff for \$355.43, with interest from May 1, 1887, single damages. On February 26, 1890, on motion, it was ordered that judgment be entered on the verdict for \$1,066.49, being treble damages. Thereupon, the defendant took this appeal, assigning for error:

1. The admission of the plaintiff's offer.¹

2-5. The answers to the defendant's points.^{2 to 5}

6. The answer to the plaintiff's point.⁶

Mr. S. Hepburn, for the appellant:

Arguments.

1. The plaintiff, Bushey, had not such title, under the Morrison warrant and patent to A. F. Gitt, as would justify a recovery in trespass against the defendant, the owner of the Blackford lands. There was not one spark of proof that the Morrison warrant was ever filed with the surveyor of the district, as required by the proprietaries and after them by the commonwealth: Sergeant's Land Laws, 167; act of April 8, 1785, 2 Sm. L. 317; act of April 3, 1792, 3 Sm. L. 70; Barton v. Smith, 1 R. 406; Schnable v. Doughty, 3 Pa. 398. A warrant without a survey is a mere license or authority to do a particular thing for the warrantee's benefit, not a grant of the land itself: Heath v. Knapp, 10 W. 406; Shoemaker v. Huffnagle, 4 W. & S. 442; Gregg v. Patterson, 9 W. & S. 205. An official survey under the warrant, and a return of it, are indispensable to the granting of a patent, and without it no title is conveyed by the patent: Kelly v. Graham, 9 W. 117; Delaware etc. Canal Co. v. Dimock, 47 Pa. 397; Hagerty v. Mathers, 31 Pa. 348; Ormsby v. Ihmsen, 34 Pa. 471; Northumberland Coal Co. v. Clement, 95 Pa. 138; Payne v. Howard, 107 Pa. 579; Strauch v. Shoemaker, 1 W. & S. 173.

2. In the return of the Thornburgh survey, made March 17, 1786, the older survey called for by the Blackford, there is given for its south line 74 perches on the county line, east from the southeast corner of the Dobson. Adding to that the 285 perches on the county line, given to the Blackford in its survey made January 3, 1792, and calling for the Thornburgh, and there was no cutting done outside the Blackford. A return of survey into the surveyor general's office, and a lapse of twenty-one years afterward, without any exception to it, is conclusive evidence that it was regularly made as returned: Nieman v. Ward, 1 W. & S. 68; Ormsby v. Ihmsen, 34 Pa. 462; Mathers v. Hegarty, 37 Pa. 64. In the latter case, the true rule in reference to the location of a tract returned surveyed is stated. When the location of a tract is more than sixty years old, it must be located by its calls, especially when adhering to them preserves the distances, figure, quantity, etc.; and that such a location causes an interference with a junior survey is of no consequence whatever. All the testimony, therefore, offered by the plaintiff to repel the legal presumption which fixed 74 perches from the Dobson for the Thornburgh, and 285 perches

Arguments.

on the county line east for the Blackford, should have been rejected, which would have left no fact in dispute for the jury: *Cross v. Tyrone Co.*, 121 Pa. 398.

Mr. A. B. Sharpe (with him *Mr. J. W. Wetzel* and *Mr. David Wills*), for the appellee:

1. The copy of the survey, found among the papers of the plaintiff, should have been admitted as some evidence of boundary: *McCausland v. Fleming*, 63 Pa. 36; *Sample v. Robb*, 16 Pa. 319. But the court below thought otherwise, and the plaintiff offered certified copies of the office records, which put it beyond a doubt that the survey had been made and returned. This was the only proof obtainable, and that it was adequate is clear upon authority: *Oliphant v. Ferren*, 1 W. 57; *Anderson v. Keim*, 10 W. 251; *Fox v. Lyon*, 27 Pa. 9; *Weidman v. Kohr*, 4 S. & R. 174; *Goddard v. Gloninger*, 5 W. 209; *Struthers v. Reese*, 4 Pa. 129; *Vastbinder v. Wager*, 6 Pa. 339. Apart from all this, the patent issued to A. F. Gitt on March 17, 1874, was *prima facie* evidence of title and of survey: *James v. Betz*, 2 Binn. 12; *Bixler v. Baker*, 4 Binn. 214; *Downing v. Gallagher*, 2 S. & R. 455; *Allison v. Rankin*, 7 S. & R. 269; the last utterance on the subject being *Olewine v. Messmore*, 128 Pa. 481.

2. No one pretends to interfere with the "Blackford survey returned into the land office with its marks and monuments on the ground still there." The single question is as to the proper location of its south line, conceded to be 285 perches in length. The defendant insists that it began 74 perches from the Dobson improvement, while, on the other hand, the plaintiff contends that the testimony establishes the fact that this distance was about 50 perches less. The chestnut stump on the county line about 24 rods east of the Dobson, the plaintiff claimed from the testimony to be a relic of the chestnut corner at the intersection of the Thornburgh and Blackford line with the county line. Yet the defendant would set this aside, because of a call on the Thornburgh for 74 perches east of the Dobson, with nothing to show where the Thornburgh terminates and the Blackford begins. But the legal presumption that lines are to be run as returned is controlled by work found on the ground applicable to them: *Grier v. Penna. Coal Co.*, 128 Pa. 83; *Bloom v. Ferguson*, 128 Pa. 380.

Opinion of the Court.

OPINION, MR. JUSTICE WILLIAMS:

The several errors assigned, in this case, have been properly treated by the learned counsel for the appellant as presenting but two questions. The first of these is over the sufficiency of the plaintiff's title to sustain a recovery upon its own strength. The second relates to the effect to be given to the legal presumption arising after the lapse of twenty-one years from the return of the survey of the Blackford, which is older than the plaintiff's survey.

The land in controversy is unseated. The plaintiff undertook, therefore, to show title out of the commonwealth, and to trace that title through a line of conveyances from the patentee to himself. For this purpose he offered the application of William Morrison, dated on the 22d January, 1848, for one-hundred acres of land in Dickinson township, Cumberland county, described as adjoining the Blackford on the west, the Duncan on the north, and the Adams county line on the south; also the warrant, issued in pursuance of the application, authorizing the survey of the land applied for. These were admitted without objection. He then offered to show that Lamberton, the deputy surveyor, now deceased, made a survey of the land under the authority of the warrant; that he returned the survey so made into the land office; and that the original return has been lost, and cannot be found after careful search by the proper officer. To show what the return was, he offered what purported to be a copy of it, made by Lamberton for his employer, which has passed with the title through the hands of the several holders down to the plaintiff. He also offered the patent from the commonwealth to Gitt for the same land, based upon and reciting the warrant to Morrison, the survey made under its authority, and the vesting of Morrison's title in the patentee. All this was objected to; so much as precedes the offer of the patent, because it was insufficient to show that a survey had been made and returned into the land office, and the patent was objected to on the ground that it did not pass the title of the commonwealth without proof of a previous survey and return by the deputy surveyor.

The first of these objections went rather against the effect of the evidence than its admissibility. The question for the court was, whether the several facts embraced in the offer were

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competent to go to the jury, in support of the plaintiff's position that the survey had been regularly made and returned. If competent, their sufficiency was a question for the jury. But if the incompetency of the alleged copy of the return should be conceded, we do not see why the patent was not entirely competent. A patent is simply the deed of the state to its grantee. Its execution and delivery are an admission that all previous proceedings have been had, and all necessary formalities have been complied with. In *Balliot v. Bauman*, 5 W. & S. 150, this question was distinctly ruled, and the principle stated by SERGEANT, J., thus: "The patent conveys the full legal title of the state, and is, as to her, a merger of the previous proceedings, and a waiver of informalities; it is, moreover, full and express notice to every person whatever that the land has been granted away, and is not vacant." The patent is therefore prima facie evidence of title and of survey: *James v. Betz*, 2 Binn. 12; *Whitmire v. Napier*, 4 S. & R. 290; *Smith v. Vashinder*, 77 Pa. 127; *Olewine v. Messmore*, 128 Pa. 470. As the case stood when this offer was made, the plaintiff had a right to lay his patent before the jury as proof, prima facie, that the title of the commonwealth to the land described in it had passed regularly to the patentee, whose title he proposed to trace to himself. The first question, presented by the appellant, must therefore be answered in the affirmative.

The plaintiff did show a title in himself good, prima facie, against the commonwealth, and therefore good against all comers who could not show an earlier or a better title. His title was therefore sufficient to sustain a verdict, and he had a right to recover upon it unless the defendant could overcome it with a better one. The patent, though prima facie, was not conclusive, and the defendant had the right to controvert the effect of its recitals: *Burd v. Seabold*, 6 S. & R. 137; and show that the land was appropriated before the patent was issued, or the application of Morrison made. In *Kelly v. Graham*, 9 W. 116, the plaintiff put his patent in evidence. The defendant, in order to overcome this prima facie case, put in the warrant and survey on which the plaintiff's patent was based, and showed that the land in controversy, though covered by the patent, was not embraced in the survey. He then showed a prior right in himself by actual settlement on the land. This show-

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ing overcame the *prima facie* case made by the patent, and enabled the defendant to hold the land thus improperly included in the plaintiff's patent. In *Payne v. Howard*, 107 Pa. 579, the plaintiff claimed land not embraced in his patent, and the burden of proof was on him to show that the land was covered by his survey, and omitted from his patent by mistake. Failing to make the showing necessary to enable him to recover against his own patent, he was properly nonsuited. The trouble was that he, and not the defendant, had to take up the burden of proof, because his patent did not cover the land he claimed. If it had covered the land, he could not have been nonsuited, and the defendant would have been compelled to assume the burden of proof.

We come now to the second question, the effect of the legal presumption arising from the return of the survey of the Blackford. The warrant for the Blackford was issued in October, 1792, returned on the 6th March, 1821, as surveyed on the 3d January, 1795, and the patent was issued in February, 1821. As the Morrison warrant was not issued until 1848, it is clear that if the Blackford covered the ground the plaintiff had no title. This was the real question in the case. How was it to be determined? By locating the Blackford on the ground. If its lines embraced the land in controversy, the defendant was entitled to a verdict; if they did not, then the plaintiff's title was not disturbed, and he could recover upon it. The defendant undertook, accordingly, to show the location of the Blackford.

If the return of survey had called for no marks on the ground, but for the lines of adjoining warrants, then the legal presumption on which the learned counsel for the appellant relies would have prevailed, and the location of the surveys called for would have been a location of the Blackford; but the official return calls for marks on the ground, and these are the highest evidence of the location of the lines. It is true that, after the lapse of twenty-one years, the law presumes that the survey was made as returned. In other words, the law presumes that the officer made his return in accordance with the facts, as his duty and his oath of office required. Having made return that he ran certain lines for the purpose of locating the warrant, the legal presumption makes that return conclusive

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that he did run them as he has stated. But where are the lines so run? This is a question of fact to which the legal presumption cannot apply, until some mark of the survey has been actually discovered that may serve as a starting point. If the marks called for at any corner can be found on the ground, the legal presumption, fixing itself upon this corner, will inclose the entire tract, by running the courses and distances laid down in the official return. If the marks called for are the lines of older tracts, which the surveyor adopted as the lines of his survey, then the older tracts must be located and the position of the adopted lines established, at the outset. When this is done, the legal presumption affirms that these lines were adopted as the exterior lines of the tract which calls for them as adjoiningers, just as the deputy surveyor affirmed by his return; and the fact that such location changes the courses and distances, or the shape of the tract as returned, will be disregarded. If the return calls for marked trees or other fixed monuments on the lines and at the corners of the tract, these marks, when found, locate the tract without regard to calls for adjoiningers, for they are the proofs of the actual presence, the official footprints, of the deputy-surveyor on the ground. When some of them are found, the legal presumption supplies the loss of others, and incloses the tract. This subject was discussed, and the authorities collected, in *Grier v. Coal Co.*, 128 Pa. 79, and in *Bloom v. Ferguson*, 128 Pa. 362, and it is not necessary to repeat what was there said.

When we apply the rule to this case, it will be seen that the legal presumption was not conclusively for or against the defendant in this case. The Blackford tract, under which the defendants claimed title to the land in controversy, was bounded on the north by the Duncan, and on the south by the county line. It called for the Thornburgh on the west, and for a chestnut at its southwest corner. The defendant's theory of the location of the division line between the Blackford and the Thornburgh rested on the Dobson improvement and the official distances. Establishing the southwest corner of the Blackford in this manner, and running east two hundred and eighty-five perches, as called for by the return of survey, and then turning north, they would embrace the land covered by the Morrison within their own lines. The plaintiff's theory, on the other

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hand, was that the chestnut, at the southwest corner of the Blackford, was actually on the ground fifty rods further west than the corner assumed by the defendant. Starting from this corner and running out two hundred eighty-five rods, he claimed to find the pine called for as the southeast corner of the Blackford, and turning thence north he claimed to find an original east line about fifty rods further west of that claimed by the defendant. The location of the Blackford, therefore, and the plaintiff's right to recover, depended on which of these theories should be found by the jury to be the true one. If the chestnut at the southwest, and the pine, called also the Slusser corner, at the southeast, were the original corners of the Blackford, marked on the ground and returned to the land office as the corners of the Blackford, they settled the question of location in favor of the plaintiff. The legal presumption, attaching itself to these established monuments, would, in the absence of other marks, close the survey by running the official courses and distances from them. If these were not marks of the original survey, then the distances and recitals in the return would lead to the conclusion that the location resting on the Dobson improvement was the proper one.

It would be difficult to imagine a clearer question of fact than that over the original character of the chestnut and the pine corners. It was peculiarly a question for the jury, and it was carefully submitted to them by the learned judge of the court below. If they have reached a wrong conclusion, the remedy was in the court below. There was evidence before the jury tending to show the original character of these corners, and fixing the east line of the Blackford in accordance with the theory of the plaintiff, which, if believed, was amply sufficient to justify their verdict, as the case appears on the paper-books. As the question was properly submitted, the errors assigned are not sustained, and

The judgment is affirmed.

Statement of Facts.

J. H. PALMER ET AL. v. JOHN TRUBY ET AL.

APPEAL BY DEFENDANTS FROM THE COURT OF COMMON PLEAS
OF WARREN COUNTY.

Argued May 5, 1890—Decided October 6, 1890.

[To be reported.]

1. Where a receiver, appointed by the court on the application of the parties, pending an ejectment to recover lands demised for oil production, pays out money upon the order of the court, in good faith, he will be protected, even though the order was made improvidently.
2. If, however, the decree was obtained by mistake or fraud and the money paid out thereon to one of the parties, the court, even after such payment, has power to rescind the decree and require the payees to restore the money to the custody of the court or of its officer.
3. But, if the decree was made in the presence and with the knowledge and assent of the attorneys representing both parties, an order upon the payees for re-payment will not be made, unless the petitioners present a strong equity and show that they will sustain an irreparable injury, if it be not made.
4. The lessees of land, demised to them for the production of oil alone, who obtain gas but not oil, and are thereupon dispossessed by ejectment brought upon a forfeiture alleged, have no equity to be reimbursed the expenses of their operations out of the proceeds of the gas obtained.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

No. 416 January Term 1889, Sup. Ct.; court below, No. 76 September Term 1884, C. P.

On August 2, 1884, by virtue of a warrant of attorney contained in a written lease of land for oil production, a copy of which was filed, a judgment in ejectment for the land demised, to wit, a tract containing 212 acres in Sheffield township, was entered by confession in favor of J. H. Palmer, C. C. Hill, Emma L. DeCondres, and Bertha Hill against John Truby, and also E. P. Allen and Melvina Allen, partners as Allen & Co., and a writ of habere facias possessionem at once issued. On August 5th, on motion of defendants' attorney, a rule to show cause why the writ of habere facias possessionem should not be set aside and the judgment opened was granted, proceedings to stay in the meantime.

Statement of Facts.

On May 9, 1885, pending the proceedings on the foregoing rule, by agreement of the parties Mr. W. D. Hinckley was appointed receiver to take charge of the property in controversy.

On September 5, 1885, an opinion of the court was filed, whereby the pending rule to set aside the writ and open the judgment, etc., was refused; whereupon the defendants took a writ of error to the Supreme Court, on which, on October 4, 1886, the judgment and order of the court below were affirmed: See *Truby v. Palmer*, 4 Cent. R. 925. Soon afterward, the writ of *habere facias* was executed and the plaintiffs put in possession of the demised premises. The terms of the lease, upon which said proceedings were had, appear in the report of the case referred to and in the opinion of the Supreme Court in the present case.

On November 10, 1886, Mr. Hinckley, as receiver, filed his final account, which was confirmed nisi exceptions were filed within ten days.

No exceptions having been filed, on November 22, 1886, Mr. Hinckley presented his petition praying that an order be made directing him to make disposition of the moneys in his hands, and that he be discharged from the responsibilities of his appointment, etc. Thereupon, the court made the following order: "The receiver is directed to pay to the plaintiffs the sum of \$2,400, and that the amount of \$88.49 be paid into court to await further order, and that thereupon the receiver be discharged."

On the same day, to wit, November 22, 1886, the defendants, by their attorney, moved the court "to rescind the order this day granted, allowing the plaintiffs to receive the sum of \$2,400 of the fund in the receiver's hands, the same having been granted without sufficient notice of the application to the defendants, and without sufficient consideration of the equities of the defendants to payment, out of said fund, of the expenses of improvements made by them; and for an order on said plaintiffs to restore said fund, if the same has been paid over to them."

The rule was granted as prayed for, and on December 16th, the defendants presented a formal petition, in which it was averred, *inter alia*, that in the drilling of a well on the demised premises from which the gas was produced from the sale of which the fund in the hands of the receiver accrued, and in the

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other operations necessarily connected with drilling and operating on said premises, a large sum had been necessarily expended, which should have been paid by the receiver out of the funds in his hands, and that the reasonable cost of said mining operations amounted to \$2,000; that said receiver, upon motion made in court, and without notice to defendants, gave a check for the entire fund, less a small sum, to the plaintiffs; that, as the petitioners were informed, said plaintiffs and their attorneys, before said fund was received by any of them, were notified that an application would be made to have the order allowing said receiver to pay said sum to plaintiffs rescinded, and to have the fund retained until the rights of the parties to said fund should be determined. Wherefore, etc.

To this petition the receiver and the plaintiffs made answer. In the answers it was averred, *inter alia*, that when the receiver presented his petition for the order made on November 22, 1886, the attorneys for the plaintiffs and attorneys representing the defendants were present and were heard by the court upon the question as to what order should be made, and that the order made was without objection or exception by the counsel for defendants, but by and with their advice and concurrence; that, after the making of said order, the receiver paid out the money as he was thereby directed, without notice to him that there was any objection to the payment on the part of the defendants, and that the money received by the plaintiffs was at once divided among them in proportion to their several interests therein. Other averments were made, in reply to the averments of the defendants' petition relating to the cost of operations upon the leasehold.

On February 6, 1888, the cause having been argued upon the petition, answers, and testimony filed, the court, BROWN, P. J., filed the following opinion and decree:

It is very certain that had the counsel for the defendants been apprised of the equitable claim to the fund which the defendants now set up, so that he could have asserted the same, or had the court been apprised in any way of the existence of the claim of defendants, the order of November 22d would not have been made, until the claim of defendants and their right to the whole or a portion of the fund had been adjudicated.

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At the time the order was made, the only question raised was in regard to certain costs which the defendants, by their counsel, asserted should be paid from the funds, and to meet this, the sum of \$88.49 was ordered into court.

It appears by the depositions, and the answers filed, that the plaintiffs were notified after they had received the check or checks for the funds, and before the same were paid by the bank, that application would be made to rescind the order directing the fund to be paid to them, but it further appears that before such application was in fact made, the checks had been presented to the bank and the fund paid over to the plaintiffs.

That the plaintiffs made haste to get the money from the bank where it was, as we understand, deposited by the receiver, before the order of court should be rescinded, is probably true, but nevertheless they did so receive it. Having thus received it from the receiver, who paid it under the order of the court, it seems clear that the receiver is exempt from any further liability. The fund has passed from the control of the court and from its officer. Can the court, upon motion, order the plaintiffs to pay the money received by them into court, to the end that any equitable claim of the defendants thereto may be determined? We think not. The parties and the subject matter are out of court. The court has lost its grasp on the fund. Whatever equitable claim the defendants may have for their expenditures on the property recovered by the plaintiffs, we think, can now only be shown in an independent proceeding. We are reluctantly brought to the conclusion that we are powerless, in this proceeding, to order the plaintiffs to pay into court the money received by them.

The rules mentioned in the heading of this decision are discharged.

Thereupon, the defendants took this appeal, specifying that the court erred:

1. In discharging the rule to show cause granted November 22, 1886.
2. In dismissing the petition of the defendants.
3. In not rescinding its order of November 22, 1886, and in not ordering the plaintiffs to restore the fund received by them to the custody of the court or of its officer.

Arguments.

Mr. Samuel T. Neill, for the appellants:

1. The equity which sustains the prior right of the defendants upon this fund is, that their labor, money and property have gone to the actual benefit of the plaintiffs, by developing and thus immensely enhancing the value of their property. This is the doctrine applicable to the case in almost the very words of this court, as stated in *Noble v. Biddle*, 81* Pa. 438. The action for mesne profits is equitable in its character; hence, a bona fide occupant, under claim of title, who has made permanent and valuable improvements, may show them to be a full compensation for the use of the premises: *Morrison v. Robinson*, 31 Pa. 456; *Ege v. Kille*, 84 Pa. 340. In *Bright v. Boyd*, 1 Story 478, cited at length in 2 Story's Eq. J., § 799 b. n. 4, STORY, J., says: "I have ventured to suggest that the claim of the bona fide purchaser (to compensation) is founded in equity. I think it is founded in the highest equity." Moreover, under the rule established by *Head v. Meloney*, 111 Pa. 99; *Gordinier's App.*, 89 Pa. 528, and *Frauenthal's App.*, 100 Pa. 290, the proceedings taken by the defendants, by petition and rule, followed by answers and the taking of depositions, and the opinion and decree of the court upon the case as thus presented, would seem to be a bar to any other proceeding.

2. That the court below took a conservative view of the power of the court in this matter was mainly due to the fact that, in his opinion, an independent proceeding was available to defendants. But a state of facts existed calling loudly for the interposition of the court. When the plaintiffs were notified, soon after the order was made allowing them to take the fund, that the defendants had a right to be heard on the distribution thereof, no part of it had yet come into their possession. The haste to avoid the interposition of the court, to overreach an opposing party, and to obstruct the course of justice and prevent equity being done, has never yet failed to receive condemnation. The notice to the attorneys of the defendants of the filing of the receiver's account, will not defeat the rights of the defendants. The presence of their attorneys did not bind the defendants; their functions as attorneys in the ejectment ceased with the execution of the writ of habere facias: *Lusk v. Hastings*, 1 Hill 656; *Macbeth v. Cooke*, 1 Moore & P. 513; *Stackhouse v. O'Hara*, 14 Pa. 89; *Wharton*

Arguments.

on Agency, 539. The defendants themselves were entitled to notice of the application of the receiver to dispose of the fund: *Brightly's Eq.*, 608, 609.

3. Concede, for the sake of the argument, that the plaintiffs can set up their own wrong, and that they, in bad faith, did get actual possession of the cash, after notice and before the court could correct the error, that does not deprive the court of the power to order them to return the money thus received to the custody of the court: *Mayhew v. West Va. Oil Co.*, 24 Fed. R. 205, affirmed in the Supreme Court of the United States as *Camden v. Mahew*, 129 U. S. 73; *Johnson's App.*, 114 Pa. 132; *Connelly v. Philadelphia*, 86 Pa. 110. How stands the case upon the facts? The fund was still in the bank to the credit of the receiver, at the time the defendant's counsel notified the plaintiffs and their counsel of the intended application to have the order rescinded. The plaintiffs are clearly estopped from taking advantage of their own wrong. Such conduct was a fraud upon the court, and no title to a fund under its jurisdiction thus acquired can be set up as a reason for retaining it.

Mr. W. W. Wilbur (with him *Mr. William Schnur*, *Mr. Charles H. Noyes* and *Mr. R. Brown*), for the appellees:

1. The rights of these parties under the oil-lease have been entirely adjudicated and determined by this court, in *Truby v. Palmer*, 4 Cent. R. 925, and the result of that adjudication is that on August 2, 1884, when the judgment in ejectment was entered against the lessees, their rights had ceased under the lease, and that said lessees never had any right whatever, in law or equity, to the proceeds of the gas in question, which they now seek the aid of this court to transfer to them. Moreover, the proceeds of the gas was the product of the well accruing after the judgment in ejectment had been entered, the rights of said lessees to any profits whatever had then ceased and determined, and the expenditures asked to be reimbursed to the lessees were made long before said judgment was entered.

2. The lessees were not only not entitled to the gas, but had no right to occupy or use the land leased to produce gas or any other product except oil. This case has no principles or features in common with an action for mesne profits. The parties' rights are determined by the contract, which is the law

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between them ; under it, there is no ground for equity to grasp this product of gas and give it to the lessees for expenditures made in experimenting for oil, for they never had any right whatever, under the contract, to the gas or its proceeds : *Foster v. Weaver*, 118 Pa. 42. No inadvertence or mistake led to the expenditures of the lessees in the present case.

OPINION, Mr. CHIEF JUSTICE PAXSON :

It is very plain that the order of the court below must be affirmed, so far as the receiver is concerned. He paid the money out, in good faith, upon the order of the court. If we concede such order to have been improvidently made, the receiver is nevertheless protected. The real question here is, whether the plaintiffs, to whom the receiver paid the money in obedience to the order of the court, should be obliged to pay it back to the receiver to answer the demands or claims of the appellants against the same.

It is not claimed that any fraud was practiced in procuring the order of the court ordering the money to be paid to plaintiffs. The receiver duly filed his account in the proper court, which was confirmed absolutely, the attorneys for the respective parties having notice of such filing, and no exceptions were filed thereto. On November 22, 1886, after the confirmation of his account, the receiver presented his petition in open court, asking that an order might be made directing how he should dispose of the money in his hands. The receiver avers in his answer, and I do not understand it to be denied, that the attorneys representing the respective parties had notice, at the time, of the presentation of said petition, were present in court when the same was presented, and were heard by the court upon the question of what order should be made. After such hearing, the court made the order which the appellants seek to have rescinded. On the same day that the money was paid to the plaintiffs in pursuance of the order, the appellants obtained a rule on the plaintiffs and the receiver to show cause why the said sum of \$2,400 should not be paid into court. It was alleged, and the fact appears to be, that the plaintiffs had notice that such a rule would be applied for, before they actually drew from the bank the money due on the check they obtained from the receiver. Under these circumstances, the learned

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judge below discharged the rule, upon the ground principally that the fund having actually passed out of the hands of the receiver, it was no longer subject to the control of the court.

We do not think this necessarily follows. The money was paid to some of the parties litigant, and we are of opinion that if a mistake had been made, much more if a fraud had been practiced upon the court, the learned judge, sitting as a chancellor, could have required the plaintiffs to refund the money, especially in view of the fact that it was actually received after notice that the rule would be applied for. In the case in hand, however, there was neither fraud, accident, nor mistake. It was not done in a corner. It was done in open court, in the presence and with the knowledge of the respective attorneys. There was a time and opportunity to object, and it was neglected, until after the order was made and the money paid over, or at least until the check was given, which is practically the same thing. Under such circumstances, we have no right to interfere unless the appellants present a strong equity, and show that they will sustain irreparable injury if we fail to do so. They have not shown any such equity.

The appellants were the lessees of certain oil territory. The lease was so drawn as to exclude any right on their part to any minerals, gas, or other valuable products, on the lands leased, except "petroleum, rock, or carbon oil." The effect of this lease was before this court in *Truby v. Palmer*, 4 Cent. R. 925, in which we said :

"It (the lease) expressly declares the property shall be occupied and worked for petroleum, rock, or carbon oil, and shall not be occupied or used for any other purpose whatever; and if no oil is found in paying quantities within four years from this date, (the date of the lease,) this lease shall be null and void. Oil was not so found. It would be a clear perversion of language to hold that gas and oil are synonymous terms. The evidence is insufficient to prove that the word 'gas' was omitted from the lease through fraud, accident, or mistake. The doctrine of equitable estoppel is not applicable to the facts proved."

The appellants put down one well, but gas, not oil, was obtained. They failed to put down a second well as required by the lease, whereby it became forfeited: they were dispossessed

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under proceedings in ejectment; a receiver was appointed to take care of the gas, and the fund in court is the proceeds thereof. The appellants contend that they have an equitable claim to be reimbursed out of the fund for the expenses of putting down the well, inasmuch as it has proved of value to the plaintiffs. *Noble v. Biddle*, 81* Pa. 430, and *Ege v. Kille*, 84 Pa. 333, were cited as sustaining this view.

As I understand the doctrine of those cases, it is that the action for mesne profits is an equitable one; and hence, a bona fide occupant, under claim of title, who has made permanent and valuable improvements, may show them to be a full compensation for the use of the premises. While no one doubts either this principle or its justice, I am wholly unable to see its application to this case. The plaintiffs are not making any claim for mesne profits. The rights of the parties are determined by their contract, which is a law of their own making. It is a speculative contract, wholly at the risk of the lessees. If they obtain oil, they may make a profit, in some instances a very large one; while if they fail, the loss is wholly their own. They have no right to be reimbursed by the lessors, or out of their property, under any circumstances whatever. As before observed, it was a speculation pure and simple, in which the lessees assumed all the risk. They did so, for the chance of getting seven eighths of the oil. Upon what principle of equity can this risk be shifted upon the lessors, and they be required to pay for the expenditures which the lessees agreed to make at their own risk? It will be seen at a glance that there is no analogy between such case and that of a person who is in possession of land, under color of title, and innocently builds a house or barn, or makes other valuable and permanent improvements upon it. In such case, in an action for mesne profits, he may justly be allowed for the value of such improvements to the extent they have increased the value of the property. But here, the lessees did nothing but what they had agreed to do at their own risk.

Under these circumstances, we need not scrutinize the action of the court below in discharging the rule. The appellants have no equity. It is sufficient to say that the order to the receiver was properly made, and the money paid to the proper persons.

Judgment affirmed.

Syllabus.

MARY C. DEXTER v. AUSTIN LATHROP.

136 565
3950*471APPEAL BY PLAINTIFF FROM THE COURT OF COMMON PLEAS
OF TIOGA COUNTY.

Argued May 5, 1890—Decided October 6, 1890.

[To be reported.]

- (a) A contract made in 1850, provided for the sale by the vendor "of all the pine, norway, and oak timber, suitable for sawing, and down to twelve inches in diameter at the smallest end of the log, on his tract of timber land," to be paid for by the thousand feet or by the acre, at the election of the purchasers;
- (b) "But in either case they are to take said timber clean as they go, including all fit for sawing and down to twelve inches in diameter at the smallest end of the log: . . . the timber to be taken off clean; that is, all good merchantable timber down to twelve inches at the smallest end of the log."
- (c) "And also, whether they take by the thousand or by the acre, to cut the timber clean as they go; that is, when they commence cutting upon any one hundred acres they will take the timber off from that part, . . . to prevent them from running over the whole tract and cutting out the best timber, or the best groves of timber, and leave the balance scattered over the tract: "
1. The words "down to twelve inches in diameter at the smallest end of the log," in their connection, did not create a reservation of timber to be left standing, or an exception of certain sizes out of the general grant of all the timber, but were parenthetical and explanatory of the duty of the purchasers to the vendor.
 2. Said contract, therefore, construed in the light of the period when it was made and of its application to the timber on a very large tract, required the purchasers to cut and remove all good merchantable timber, "including all fit for sawing," to be determined when the trees were reached in the process of removal, down to twelve inches in diameter.
 3. Under said contract, the vendor and purchasers did not sustain to each other the relation of tenants in common, but each was a sole tenant of his own estate, the one in the land, the other in the timber: *Wheeler v. Carpenter*, 107 Pa. 271, and *Shiffer v. Broadhead*, 126 Pa. 260, explained and distinguished.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and McCOLLUM, JJ.

No. 68 July Term 1889, Sup. Ct.; court below, No. 545 November term 1886, C. P.

Statement of Facts.

On December 1, 1886, Mary C. Dexter and John M. Dexter, her husband, in the right of said Mary C. Dexter, brought trover against C. C. B. Walker and Austin Lathrop, Jr., and on January 11, 1887, filed a statement of claim which closed: "This action of trover is brought to recover treble damages, under § 3 of the act of March 29, 1824, [8 Sm. L. 283] for the timber and lumber cut down, felled, carried away and converted as aforesaid, by and to the use of the defendants." The defendants pleaded not guilty and the statute of limitations. C. C. B. Walker died after suit brought and his death was suggested of record.

At the trial on April 13, 1889, the jury were sworn as to defendant Lathrop alone, and a case was shown which in brief was as follows:

In 1823 Silas Billings had a large body of wild lands, containing about 7000 acres, surveyed into lots of from fifty to several hundred acres each, some of which he sold. On March 1, 1850, he entered into a contract relating to the timber on about 5000 acres of the lands remaining unsold, which was as follows:

"Memorandum of an agreement made the first day of March, A. D. 1850, between Silas Billings, ... of the first part, and Sylvester G. Andrus and Jervis Langdon, ... of the second part; witnesseth, that said Silas Billings, in consideration of the covenants and agreements herein mentioned on the part of the said Andrus & Langdon to be performed and fulfilled and kept, doth agree to sell and by these presents doth sell to the said Andrus & Langdon all the pine, norway and oak timber suitable for sawing, and down to twelve inches in diameter at the smallest end, on his tract of timber land lying containing between four and five thousand acres. . . . It is hereby stated and expressly agreed upon between the parties that it shall be optional with the said Andrus & Langdon to have the whole of the pine and norway and oak timber on the lands above specified at ten dollars per acre for the timber, payable as fast as the same shall be taken off, or to take all the white pine, norway and oak timber at ten shillings per thousand feet, board measure, or to take so much of the white pine timber from the upper two thousand acres as shall amount to three thousand dollars, with interest, at one dollar and seventy-five cents per thousand feet, board measure, or from

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any part of the balance of the tract at one dollar and twenty-five cents per thousand feet, board measure, which option shall be decided by the said Andrus and Langdon within sixty days from this date and notice given to the said Billings, accordingly, within that time; but in either case they are to take said timber clean as they go, including all fit for sawing and down to twelve inches in diameter at the smallest end of the log. And the said Andrus and Langdon, in consideration of the premises, covenant, promise and agree to pay to the said Billings, as above specified, as fast as they shall take off said timber; and if they take the whole by the acre at ten dollars per acre as above specified, or by the thousand feet as above expressed by the thousand feet and agree to advance to said Billings three thousand dollars, as follows, to wit: If taken by the thousand feet, the quantity in the logs is to be settled for by measurement on the bank before running, the timber to be taken off clean; that is, all good merchantable timber down to twelve inches at the smallest end of the log; and the said Andrus and Langdon agree to take all the good merchantable oak and norway at the same rate as the white pine, if they elect to take the whole timber by the thousand, and also whether they take by the thousand or by the acre, to cut the timber clean as they go; that is, when they commence cutting upon any one hundred acres they will take the timber off from that part. It is not the intent or design of this contract to prevent the said Andrus and Langdon from cutting on more than one piece at a time, for it is expected they will work at several different points at the same time; but it is expressly intended to prevent them from running over the whole tract and culling out the best timber, or the best groves of timber, and leave the balance scattered over the tract. And the said Andrus and Langdon hereby covenant and agree to take off at least three million feet of said timber, board measure, per year, and are at liberty to take as much more per year as they think proper, paying for the same as above agreed as fast as taken; In witness whereof the said parties have hereunto set their hands and seals on the day and year first above written.

“SILAS BILLINGS, [SEAL.]

“S. G. ANDRUS, [SEAL.]

“JERVIS LANGDON, [SEAL.]”

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Before the expiration of the sixty days' option, Andrus and Langdon assigned their interest in the foregoing contract to John C. Cameron and others, and on October 25, 1852, Billings entered into a written agreement with the then assignees of the contract by which "with a view to a final arrangement and settlement of the annexed contract, so far as the purchase money of the timber and the quantities are concerned," the said Billings consented to receive the sum of \$23,065.24, which the other parties bound themselves to pay in specified instalments.

Billings died in 1853, intestate. On July 3, 1854, his heirs, by proper conveyances, divided among themselves the lands covered by the Andrus and Langdon contract, and Mrs. Dexter, the plaintiff, received a conveyance of certain numbered lots containing 675 acres, as her share thereof.

Timber was cut upon lots of the plaintiff, by different parties, operating under the contract, from the winter of 1852-3 to 1860; none was cut from 1860 until the fall of 1864, when Walker and Lathrop, as assignees of the contract, began cutting timber, and continued from time to time until 1870. Mrs. Dexter was married to her present husband in 1862.

The plaintiff, claiming that the defendants had no right, under the contract, to cut and remove any timber that in 1853 was less than twelve inches in diameter at the top of the first log, made an offer to prove by Benson Tubbs, a witness on the stand, what the growth in diameter of the pine timber was, from 1853, when the contract with Andrus and Langdon was to go into effect, up to the time the same was cut and converted by the defendant; this, for the purpose of charging the defendant with the cutting of all timber that in 1853 was not twelve inches in diameter at the top of the first log.

Objected to.

By the court: We adhere to our conclusion as to the proper construction of this contract, and sustain the objections; exception.¹

The plaintiff, claiming further, that all the plaintiff's lots had been cut over prior to 1860, that the rights of the assignees of the contract were then exhausted, and that defendant had no right to enter upon plaintiff's lands for any purpose in 1864, offered to prove the operations upon the lands at the various dates from 1853 to 1860, and the suspension thereof until the fall or winter of 1864, until the defendant began operations.

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Objected to.

By the court: Objections sustained; exception.³

At the close of the testimony, the court, MITCHELL, P. J., charged the jury in part as follows:

[By that contract Silas Billings sold to Andrus and Langdon all the pine, norway and oak timber suitable for sawing, down to twelve inches in diameter at the smallest end of the log, standing on the lands covered by the Billings contract; and among these lands are the lands of the plaintiff in this action, Mrs. Dexter. If the contract had no further reference to the quality and character of the timber, or to the subject of the sale of the timber, than the words occurring in the first part of it, we think the construction might be different. But there are several other references to that matter, in the contract, and taking them all together we think the proper construction is that Mr. Billings sold all of that particular kind of timber, that is, pine, norway and oak, not only that which was of the size described at the time the contract was made, but also all that should be, or that should come up to that size, at any time before the whole of the timber sold should be taken from these lands. The substance of this is, that we think this contract is, in effect, a sale of the timber on the Dexter lands, which had grown to be of that size at the time of the cutting shown by the evidence in this case.]³

It is true, in the contract the vendees are required to cut off at least three million feet a year, but there is no evidence in the case showing how many millions there were on this body of lands; so there is nothing, really, by which the court and jury can determine what time was contemplated, if any time was contemplated by the parties, that this timber should be taken off. [Therefore we think no time was fixed by the parties to that contract; and, as there was no time fixed, so long as timber of the character described in the contract was standing upon the lands of Mary C. Dexter, the plaintiff in this case, these vendees, Andrus and Langdon, and all persons claiming under them, had the right to enter upon these lands and cut that timber. So we have come to the conclusion that the entry of Walker and Lathrop, claiming under that contract, was a lawful and proper entry made for that purpose.]⁴

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[We say to you, then, that we regard this as the meaning of that contract; that it transferred from Silas Billings to Andrus and Langdon all the timber suitable for sawing, pine and norway and oak, down to the size defined in the contract itself, and that, so far as the size is concerned, the vendees of that timber and those claiming under them had a right to take down to that size, when they should cut it.]⁵ We believe that is a reasonable construction of that contract. As a matter of course, when a large tract of lands like these is entered upon for the purpose of lumbering, it would be only husband-like or lumberman-like, so to speak, to cut off all that would be suitable for sawing or manufacturing purposes. And that evidently was contemplated by the parties. And very likely it was intended, as has been argued, to be obligatory upon the vendees to take the timber down to the size described in the contract, twelve inches at the top of the first log. But, gentlemen, if it made it obligatory upon their part to take that timber, the obligation must have been mutual and the rights resulting from it mutual. That is one of the principles that must be considered in construing contracts; they must be mutual. And if the vendees had the right to take the timber down to a certain size, then the vendor had the right to require them to pay for the timber down to a certain size. That fixes the limit of the timber that could be taken under this contract. And we think the owner of the land had in contemplation the growth of the timber at the time the contract was made, in saying that timber of such a size might be cut, and that when you cut you shall cut clean and down to a certain size. . . .

[This action is brought under an old act of assembly, the act of 1824, which is a highly penal statute, enacted for the purpose of preventing trespasses upon wild lands. In a new and woody country like this, it was no uncommon thing for a man to trespass upon lands of that kind, and this act was intended to prevent such a trespass. In any case coming within this provision, if the timber was cut and left on the ground, the value of it was doubled; but, if cut and taken away, three times its value was allowed for such trespass and conversion. But, gentlemen, we do not think this is one of those cases contemplated by the act of 1824. Therefore, we are not disposed to submit the question of double or treble damages, if any are to be recovered in this case, to you.]⁶

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The reason why we think that act does not apply in this case, will be given in answer to a point submitted to the court. . . .

The defendant's counsel ask the court to charge the jury:

1. That, under the pleadings and evidence in this case, the plaintiff cannot recover for any timber cut or converted prior to six years before the commencement of this suit.

Answer: The first point is refused. We charge you that if you are satisfied from the evidence that Mary C. Dexter was the wife of John M. Dexter, at the time when the timber trees for the cutting and removing of which this suit was brought were cut and removed from her lands by Walker and Lathrop, and continued to be his wife down to within six years of the time when this action was commenced, the statute of limitations does not apply to her, and therefore has no application in this case. . . .

2. The contract of Silas Billings to Andrus and Langdon, selling to the latter the norway and white pine and oak timber growing on the four or five thousand acres described in said contract, with the unlimited right of ingress and egress to enter upon the lands and cut and carry away said timber, constituted said Billings and his heirs, and Andrus and Langdon and their vendees, tenants in common in the lands and timber described in said contract.

Answer: To this point we say, we think the second point so broadly stated that it is liable to mislead you in the proper determination of the issues involved in this case, and therefore we decline to affirm it. We say to you that the sale of certain pine and oak timber, on the lands described in the Billings contract and of the quality and dimensions prescribed therein, vested in Andrus and Langdon and their vendees an estate in the said lands, and the right to enter thereon to cut and remove such timber, for an indefinite period of time. The quality of this estate so vested in the vendees of that timber is such that the law requires its conveyance to be evidenced by writing, or by such other proof, as is required by law, to transfer the title to any permanent interest in lands from one person to another. Therefore, we charge you, in substance as requested in this point, that, by virtue of that contract, Andrus and Langdon were tenants in common with Silas Billings in the lands therein described, and that the successors in right to the interest of the

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parties to that contract occupy the same relation to each other, and must continue so to do until the right to enter and cut and remove said timber is exhausted by the removal thereof, or abandoned and determined by neglect to remove the same, after reasonable notice so to do. And, as the parties were and are tenants in common in the lands, they were and are also tenants in common in the timber described as sold in the contract.⁷

3. That, prior to the act of May 4, 1869, [P. L. 1251,] tenants in common could not maintain trespass or trover against each other for cutting and carrying away timber from the lands owned in common, without first proving actual ouster; and the act of 1869 does not authorize a recovery in trespass or trover for acts committed prior to its passage.

Answer: In answer to this point we say to you that Mary C. Dexter has not such an ownership in the lands from which the timber in controversy in this suit was cut, as entitles the plaintiffs to recover double or treble damages for any of the timber cut by or under the direction of Walker and Lathrop, or either of them, under the evidence in this cause. She has not such a complete and unqualified title and possession of those lands, or any of the pine or oak timber thereon, as is contemplated in the act of 1824; and therefore the defendant is not liable to her in the highly penal damages provided for in said act. The act of 1869, which affords certain remedies to tenants in common, for cutting timber by their co-tenants without consent in writing so to do, has no application to this case.⁸

4. Tenants in common cannot maintain trespass or trover under the act of 1824, giving double and treble damages for cutting and carrying away timber from the premises owned in common, and the act of May 4, 1869, has not changed the law in such cases.

Answer: What we have said in response to the third point, is a sufficient reply to the fourth; and we therefore say to you that there can be no recovery of double or treble damages in this suit.⁹

5. If the jury find from the evidence in this case that Walker and Lathrop are vendees under Andrus and Langdon or their vendees, then the defendant had the right of entry upon the

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lands described in the contract of Billings to Andrus and Langdon, and had the right to select and carry away such timber as he and the persons in his employ thought suitable under the contract; and if they cut and carried away from said premises, during the time they were occupying the same, timber to which they were not entitled under their purchase, they are not liable for such excess in an action of trespass or trover. Consequently, the plaintiff cannot recover in the form of action she has adopted.

Answer: We decline to affirm this point. In response to this point, we say to you that if you are satisfied from the evidence that Walker and Lathrop had title to and were the owners of any of the pine or oak timber, conveyed to Andrus and Langdon by their contract with Silas Billings, upon lands of Mary C. Dexter, at the time they cut the timber in controversy, they had the right at that time to enter and cut and remove the same, and had the right to select and cut and remove all such timber suitable for sawing and down to twelve inches at the top of the first log of the tree selected for such cutting, and that they might lawfully do this by their employees. But we say to you that the defendant is liable in this form of action for whatever timber of a size less than twelve inches at the top of the first log, was cut on the lands of the plaintiff by Walker and Lathrop, or by others under their direction and for their use and benefit, provided the same was manufactured for them, delivered to them, and sold and converted to their own use by them, so mixed and confused with other timber and lumber of their own that the identical timber and lumber of the plaintiff, Mary C. Dexter, thus wrongfully cut from her lands, could not be followed, identified and separated from that of Walker and Lathrop, in their possession or in the possession of those to whom they may have sold the same. But if you find from the evidence that such timber of Mary C. Dexter was not cut by or under the direction of Walker and Lathrop, or of the defendant Austin C. Lathrop, but was cut, removed, sawed and delivered to them, thus mixed and confused with their own lumber, by Mr. Bonham, as an independent contractor with them, and not as their own employee subject to their direction, and that neither they nor the defendant directed or controlled the cutting thereof, under

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Bonham, but the same was cut wholly under the direction of Bonham, then we say to you the defendant is not liable therefor in this action, unless you find that he had actual knowledge of such wrongful cutting of the timber of Mary C. Dexter, before the same was delivered to Walker and Lathrop, or, if sold by them, before the same was sold.¹⁰

6. That the plaintiff cannot recover in any case in an action of trover, where the defendant in the first instance came lawfully into the possession of the property claimed to be converted, without a demand and refusal. And the defendant in this case being lawfully in the possession of the property, as a tenant in common with the plaintiff, and no demand or refusal having been shown, there cannot be a recovery.

Answer: We think what we have said, in answer to the former points in the case, a sufficient response to this point; but we might remark that as a general rule there must be a demand to recover in an action of trover, where the defendant comes lawfully into the possession of personal property. That is the usual rule. Trover is an action of tort, as it is called. It implies a wrong on the part of the person complained of, and it is the duty of the person complaining to be neighborly enough to make a demand; but it is not necessary in every case, and in this case we are unable to say, as matter of law, that the defendant was lawfully in possession of this property. It is one of the questions of fact you are to determine under the evidence and the instructions of the court.¹¹ . . .

Very considerable has been said about this form of action, whether such an action can be maintained. We perhaps have said enough to you on that subject. We think, gentlemen, that an action of trover is very different from an action of trespass in respect to a case like this. In an action of trespass the plaintiff must allege that his close, his campus, is broken into and entered by the defendant. Trover is not brought for the cutting of this timber, or the entry upon the lands of another. Damages for that entry are waived by the plaintiff in this action. She does not claim any damages for the mere entry, but it is for what was done after the entry upon the lands. That is the claim in this case.

The jury returned a verdict in favor of the defendant.

Arguments.

Judgment having been entered, the plaintiff took this appeal, assigning for error :

1, 2. The refusal of the plaintiff's offers.^{1 2}

3-6. The portions of the charge embraced in []^{3 to 6}

7-11. The answers to the defendant's points.^{7 to 11}

Mr. J. B. Niles and *Mr. M. F. Elliott* (with them *Mr. A. R. Niles* and *Mr. F. E. Watrous*), for the appellant:

1. The sale by the contract was a present one, and the title to all such timber as passed by the sale vested at once in the vendees, and such timber as the title thereto did not presently vest in them remained the property of Billings and descended to his heirs. To what timber trees did the title at once vest in the vendees of Billings? There is no difficulty in understanding the language employed to describe the timber sold. If it is a correct construction of the agreement, that trees less than twelve inches in diameter, when the contract was made, became the property of the vendees whenever they grew to the diameter of twelve inches, then a certain class of trees would belong to the plaintiff one year, because they were less than twelve inches in diameter, and she could cut and remove them, but if she did not do so, and the next year by growth they became twelve inches in diameter, the title would change from the plaintiff to the defendant and he alone would have the right to cut and take them from the land.

2. Under the provision of the contract, that "when they commence cutting upon any one hundred acres they will take the timber off that part," we contend that the vendees of the timber, when they commenced cutting on any particular lot, were bound to continue operations from year to year, cutting clean as they progressed, until all the timber which they had purchased was removed; and, that having cut and removed timber therefrom from year to year, continuously until 1860, they had no right to cease operations until 1864, and then resume. If they could abandon the lands of the plaintiff for four years, and then return and cut over them again, there is no limit to their right to crop the lands covered by the contract, and they might return after twenty years abandonment.

3. In *Shiffer v. Broadhead*, 126 Pa. 260, this court recently placed a construction upon a contract somewhat similar to the

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one under consideration in this case. The referee's conclusion of law, in that case, that the contract for the sale of the timber should be construed as having been entered into with reference to the general custom prevailing, that the minimum size of trees standing was that of ten inches in diameter at the top end of a log twelve feet in length, first cut from the butt, was sustained by this court, and it was further held that the vendee and the contractor under him were liable in trespass for cutting trees which were not of that diameter when the contract was made. In that case, the size of the timber when the contract was made was ascertained by counting growths back from the time of the trial. It differed from our offer only in method.

4. We do not think the plaintiff and defendant were tenants in common of the land, and it certainly is not possible that they were tenants in common of the timber described as sold in the contract. Billings remained the owner and was in full possession of the land, and of such timber as was not sold by the contract. The vendees of Billings owned certain timber trees standing on Billings' lands, and they had the separate right to cut and convert such trees. The vendor and his vendees were no more tenants in common of the timber sold than they were of the hemlock timber, all of which was unsold and belonged to Billings. The act of May 4, 1869, P. L. 1251, has therefore no application, nor have the cases cited in reference to it.

5. But this court held in *Shiffer v. Broadhead*, before referred to, that an action of trespass for treble damages, under the act of 1824, could be maintained against the vendee, his contractors and servants. And it is of no consequence whether the cutting of plaintiff's timber was wilfully or mistakenly done by the defendant or his employees. Moreover, Walker and Lathrop were bound to know whether their contractor Bonham was cutting and delivering to them their own timber or that of the plaintiff. They sent him on the land to cut what they claimed to be their timber. "One is liable for his own tortious act, or for that of his agent or servant, when done by his direction or with his assent, and sometimes when he neither directs the act, nor assents to its commission, when it is done for his benefit:" *Bard v. Yohn*, 26 Pa. 490; *Dundas*

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v. Muhlenberg, 35 Pa. 351; Wharton on Agency, § 474, n. 3; 2 Kent Com., 825, n.; McCloskey v. Powell, 123 Pa. 62; Shiffer v. Broadhead, 126 Pa. 260.

Mr. J. W. Ryon (with him *Mr. S. F. Wilson* and *Mr. J. Harrison*), for the appellee:

1. It is submitted that the offer to prove by witnesses, not experts, and without any apparent knowledge, skill or ability, the probable growth of white pine, norway pine, and oak timber, from 1853, up to the time when it is alleged the timber was cut, is a most novel proposition. No fact was proposed to be proved; the most that was offered was the opinion of the witnesses referred to, as to the growth of the timber embraced in the offer. Shiffer v. Broadhead, 126 Pa. 260, is not an authority for the admission of the offer, which proposed to submit to the jury simply the guesses of witnesses as to the probable growth, not the counting of the annual growths or rings, to ascertain the increased diameter.

2. The contract was an entire one embracing all the lands described therein. The plaintiff, long after the execution of the contract, became the owner of but a small portion of the original 5,000 acres, and expressly subject to the reservation of all the timber embraced within the contract. That there had been a cessation of the cutting, on the plaintiff's portion of the land, was of no materiality. Forfeitures are not favorites of the courts, even where they are stipulated for between the parties; but forfeitures, not provided for and not contemplated by the parties, are not often declared by the courts. Where there is no provision made in the contract, for the removal of the timber, no such dangerous consequences can follow: Boults v. Mitchell, 15 Pa. 371; and there is no allegation of the violation of a single covenant by the vendees.

3. There can be but little doubt upon well-settled principles, that after the execution of that contract for the sale of the standing timber, the vendor and vendees were tenants in common of the land upon which the timber was standing. In Patison's App., 61 Pa. 294, a controversy respecting the present contract, this court decided that a contract for standing timber on a tract, to be taken off at discretion as to time, is an interest in land. Growing timber is a part of the realty, is parcel

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of the inheritance, and may be separated from the rest by express reservation or grant: *Clapp v. Draper*, 4 Mass. 265; *Putnam v. Tuttle*, 10 Gray 48; *Adams v. Iron Co.*, 7 Cush. 367; *White v. Foster*, 102 Mass. 375; *McClintock's App.*, 71 Pa. 365. And a grant of suitable timber confers upon the grantee and his assigns, not only the right to enter for the purpose of cutting and removing it, but the right to select and judge of its suitability: *Boults v. Mitchell*, 15 Pa. 379; *Six Carpenters' Case*, 8 Rep. 146 (1 Sm. L. C. *216.)

4. Thus, the contract for the standing timber gave the vendees and their assigns, not merely a right to the timber growing upon the land, but an actual interest in the land itself. The title of the vendees was an estate in the land, and as such was within the statute of frauds, requiring a written conveyance to pass such an interest. The rule, therefore, that one tenant in common cannot maintain trespass against a co-tenant, for breaking and entering the close, is a well established doctrine of the common law, and wherever that form of action may be resorted to between tenants in common, it is because there has been legislation changing the common law. The case of *Wheeler v. Carpenter*, 107 Pa. 274, applies with full force to this case, and demonstrates the accuracy of the charge of the court below.

5. The timber taken from these lands was taken under a contract let to Bonham to cut, manufacture and deliver, for so much per thousand; and it was distinctly proved that Bonham was under a specific contract to cut no timber upon the lands but the timber accurately described in the Andrus and Langdon contract. If other timber was ever cut by Bonham, no authority was ever given to cut it. "In order to fix the liability of a master for the act of a servant, it is not enough that the act of the servant was done with the intent to benefit or to serve the master; it must be something done in doing what the master employed the servant to do:" *Wood on M. & S.*, 545; *Eaton v. Railroad Co.*, 59 Me. 520; *Painter v. Pittsburgh*, 46 Pa. 213; *Allen v. Willard*, 57 Pa. 374.

OPINION, MR. JUSTICE WILLIAMS:

This case depends on the construction of the contract of March 1, 1850, between Silas Billings, of the one part, and Andrus and Langdon of the other part. It is what is known

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as a timber contract, was made forty years ago when the facilities for transportation were less, and the cost much more, than now, and it should be read in the light which the business to which it relates, with the incidents and usages of that business as then conducted, may throw upon it.

The cost of transporting logs to a mill, and the sawed lumber from the mill to some line of transportation, ordinarily a canal or a navigable stream, was so great as to make it important to remove all the timber that was worth removing by the same job or operation. The owner of wild lands, when about to sell his standing timber for removal, would therefore fix a price intended to cover the average value of the trees on the stump. In this way, the good qualities were made to sell the poor, the large trunks to sell the small ones, and those easy of access to carry with them those more difficult to reach. To protect his uncut timber from the forest fires that follow the woodsman, it was important for him to require the purchaser to cut clean, taking all the timber of the kind sold as he advanced over the tract. In this way he would keep the standing timber unbroken before him, as he moved along, and leave nothing behind to be destroyed by fire. In order that he might receive pay for all that was worth paying for, he would insert in his contract a stipulation requiring the buyer to remove and pay for all merchantable logs suitable for sawing; and, to reduce as much as possible the room for controversy, it was usual to provide that, as to size, logs should be deemed suitable down to twelve or ten inches in diameter at the small end of the log. After the contract was made, the buyer would consider the topographical situation of the tract, and push his roads, slides, or logways into the timber along some hollow or hillside, in in such way as to enable him most conveniently to reach it. So much of the surface as could be reached from one road or system of roads was then cleared of its timber trees, and when this was accomplished another hollow or the opposite hillside was entered and cleared of its trees, in the same manner, until all the timber was removed. If a tree was left standing or a log unremoved when operations ceased on any part of the tract, it was in danger of destruction by fire; but, if spared by the fire, the cost of its subsequent removal by itself was so much greater than if it had been taken with the timber about it as to

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render it valueless to the owner of the land. Stipulations upon all these subjects were usual, because they were necessary for the protection of the seller and to prevent controversy between the parties about their respective rights.

With this glance at the business to which it relates, let us now look at the provisions of this instrument. They provide for the sale by Billings to Andrus and Langdon of "all the pine, norway, and oak timber, suitable for sawing and down to twelve inches in diameter at the smallest end of the log, on his tract of timber land." The purchasers may pay for the timber by the thousand feet or by the acre, at their election, "but in either case they are to take the timber clean as they go, including all fit for sawing and down to twelve inches in diameter at the smallest end of the log." The reason given for requiring the timber to be cut clean is that, "when they commence cutting on any one hundred acres, they will take the timber off that part." If the purchasers elect to pay for the timber by the thousand feet, it is provided that it shall be measured on the bank before its removal, and that the timber shall be cut clean. This phrase is explained thus: "That is, all good merchantable timber down to twelve inches at the smallest end of the log." It is stated that operations may be conducted simultaneously on different parts of the tract, but at each place they must be conducted in the same manner, for, as the contract again explains, "it is intended to prevent them from running over the whole tract, and cutting out the best timber, or the best groves of timber, and leave the balance scattered over the tract."

We have now brought together all the provisions of the contract that described the character of the timber sold, or the manner in which it is to be cut and removed. Though evidently not the work of a lawyer, it was drawn by one who had a thorough, practical knowledge of the lumber business, and the ability to express his ideas with clearness and precision. The purpose to protect the seller, and to compel the buyer to remove all the timber suitable for sawing in the manner best calculated to preserve that left standing from fire, runs through every part of it; but there are no words of exception or reservation to be found, and none from which the existence of a purpose to reserve any part of the timber can be inferred, un-

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less the phrase "down to twelve inches in diameter at the smallest end of the log" be held to justify such an inference. These are the words on which the appellant relies. They occur three times in the contract, and each time they are used as part of the description of the timber which the buyer is to take and pay for. They are first used to describe the timber sold, thus: "All the pine, norway, and oak timber suitable for sawing and down to twelve inches in diameter at the smallest end of the log." In both the other places where they are found, they are used in stating the duty of the buyers, as in this sentence: "They are to take said timber clean as they go, including all fit for sawing and down to twelve inches in diameter at the smallest end of the log." Taken in the connection in which we find them, what do these words mean? We must remember that the purpose of the seller was to turn his standing timber into money, and that of the buyers was to saw it into marketable lumber for sale. It was the interest of the seller to require that all merchantable timber on his land should be removed and paid for. But what is a merchantable log? That depends on its size and quality, and the interest of the buyer is to handle such as will yield the largest margin over the cost of manufacture. His profits come largely from the better qualities and larger sizes. Whether a log is of a merchantable quality can only be determined on examination, but what shall be deemed a merchantable size may be settled in advance by the terms of the contract.

This contract requires the buyers to remove and pay for all the pine, norway, and oak timber suitable for sawing, and it in effect declares that a log twelve inches in diameter at the smallest end shall be deemed suitable as to size. This is not a reservation of timber to be left standing on the tract, or an exception of certain sizes out of the general grant of all the timber, but it is a parenthetical and explanatory sentence defining the duty of the buyers towards the seller. The first paragraph in which it occurs should be read thus: "Said. Billings sells all the pine, norway, and oak timber suitable for sawing (and, as to size, logs down to twelve inches in diameter at the smallest end shall be deemed suitable) on his timber tract," etc. These words should be read in the same manner wherever they occur, and understood as the declaration or agreement of

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the parties that a log twelve inches in diameter was, as to size, suitable for sawing, and to be paid for by the buyers as such. So much of the ground for controversy opened by the phrase "suitable for sawing," was closed by the agreement of the parties in advance. The effect of the contract, when read in the manner we have suggested, is to sell to Andrus and Langdon "all the pine, norway, and oak timber" on the land that was suitable for sawing. In the language of the contract, the timber was "to be cut clean" from the tract, so that no merchantable logs, or logs fit for sawing, should be left behind when the cutting was completed. Below twelve inches in diameter the buyers might determine suitability as to size as well as suitability as to quality, but at twelve inches and upwards it was settled by the contract, and they were bound to take and pay for them if their suitability depended on size only.

Such being the meaning of the contract, we are to inquire when the question of suitability for sawing was to be determined? The contract fixed three millions of feet as the minimum amount to be removed annually. Assuming that it was removed at this rate, in the absence of any complaint on that subject, it required seventeen years to remove it all, as the evidence shows us. The buyers were to move carefully over the tract, cutting clean as they went, and leaving the uncut trees in a body before them. The question of the suitability of a tree for sawing must therefore be settled when the tree was reached in the process of cutting the timber. If suitable then, it must be taken and paid for. If unsuitable, it had no value to seller or buyers, and was left behind as worthless when the woodsmen moved forward. The learned judge of the court below was right, therefore, in excluding the evidence offered to show the growth of the trees between the date of the contract and the time of actual cutting on the land of the plaintiff. It was wholly immaterial what that growth might have been, for, under the terms of the contract, suitability for sawing was to be determined when the trees were reached in the process of removing the timber, and not before. But the learned judge stopped short of the logical result of his own construction of the contract, when he instructed the jury, in substance, that the words "down to twelve inches in diameter at the smallest end of the log" were to be understood as limit-

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ing the meaning of the words "all the pine, norway, and oak timber suitable for sawing," and equivalent to a reservation by the seller to himself of all timber less than twelve inches in diameter. In this he was wrong.

The words are not a reservation in form or in legal effect. They were not intended nor do they operate as a limitation upon the right of the purchasers to take all the timber suitable for sawing on the land; but they were intended, and their legal effect is, to compel them to take, as of suitable size, all logs down to the limit named. Below that size the right and the duty to take depend on suitability for sawing, to be determined not by the contract, but by the usages of the trade, the character and location of the timber, the length of haul to reach the stream or the mill, and the character of the surface over which it is to be taken to reach the roads and logways. If the haul is short and the grade easy, a small log may be hauled with profit, which, at a greater distance or over difficult roads, could not be made to pay the cost of getting it to the mill. Let us suppose that the purchasers, in the course of their work, come to a tree having sufficient size near the ground to justify the expectation that it would furnish a log twelve inches or more in diameter at the small end. They cut it and find on actual measurement that the taper of the tree exceeds their estimate, and the log actually measures at the small end but eleven and one half inches. It is straight, free from knots and shakes, and of good quality. What must be done with this log? If the learned judge was right in his construction of the words we have been considering, the purchasers would have no right to remove it, and would be liable in trespass for twice its value for cutting it. If this was really so, the position of the purchasers would be one of some hardship. They cannot measure, nor can they estimate with absolute exactness the diameter of a tree at sixteen or thirty-two feet from the ground. If they underestimate it and leave the tree uncut, they are liable to pay for it on their contract. If they over-estimate it, they must leave it behind, and pay twice its value for having blundered in cutting it. Under our view of this contract, the purchasers would have the right to take the log notwithstanding its scant diameter, if satisfied to do so, and manufacture it, paying for it in the same way that they pay for the rest of the timber. They cannot be

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compelled to take smaller logs than the contract describes, but they may take them, under the terms of this contract, if they are in other respects suitable for sawing, and pay for them at the same rate and in the same manner that they pay for the rest of their timber. This construction makes it possible for the purchasers to do as they undertook to do, and clean the tract of "all pine, norway, and oak timber suitable for sawing," cutting it clean as they go, taking all the good, merchantable timber "fit for sawing," (and down to twelve inches in diameter at the smallest end of the log shall be deemed fit as to size,) and leaving suitability for sawing, in smaller logs, to be settled by circumstances, when they are reached. Any other construction would fail to reach the intent of the parties, and lead to endless confusion.

Perhaps it would be well to leave this case without further consideration of the assignments of error, as it must necessarily rest upon the construction which we have put upon the contract. There is one other subject, however, to which we think it our duty to advert in order to correct a misapprehension. In answer to the defendant's second point, the learned judge told the jury that, under the provisions of their contract, Andrus and Langdon became tenants in common with Billings in the land covered by it. He said, "and as these parties were and are tenants in common in the land, they were and are also tenants in common in the timber described as sold in the contract." We cannot agree to this definition of the relation these parties occupied towards each other. Tenants in common have distinct titles to separate parts of an undivided whole, but no one of them has an exclusive right in any part of the whole. The land being held in common, each tenant has a right to possession, which is incident to his title and extends over every part of the land so long as the tenancy in common continues, but partition may be compelled at any time, and, when made, the title and the right of possession in each becomes several and attaches to the purpart assigned him, so that each owns a distinct message by a distinct and several title. Until partition is made, account render or a bill in equity will lie, if one tenant takes the share of the rents and profits belonging to another.

It seems to us very clear that this was not the relation existing between Billings and Andrus and Langdon. He sold them

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no part of his land as such, but the standing timber, growing on the land. Their right to what they bought was a separate, absolute, undivided one, and was exclusive of their vendor. Billings's title to his land remained after the contract, as it was before, a separate, absolute and undivided one. He had sold, and the purchasers had acquired, as incidental to the purchase of the standing timber, the right to have their trees stand on and receive sustenance from the soil until they could be cut and removed; and the right to enter the lands, and do thereon all things needful in order to cut and remove the timber in the manner and at the rate provided for in the contract. For all purposes not inconsistent with the rights of his vendees of the timber, Billings was in possession of his entire tract as owner, and his right to the possession was (subject temporarily to the rights of the timber owners) a separate and an exclusive one. He retained no interest in, or fractional part of the title to the standing timber. Andrus and Langdon acquired no title to the land. Each owned his own estate by a title that was several and exclusive. They might be in possession of different parts of the tract, or of the same part for different purposes. Their possession might be contemporaneous and concurrent, but the right of possession of each would rest on, and its extent would be determined by his estate, one being sole owner of the land, the other being sole owner of the trees. The situation is substantially that which is created when the owner of land sells the stratum of coal which underlies it to a mining company. The owner of the coal has an exclusive right to the possession of his own estate. The owner of the surface has a like exclusive right to its possession, subject to the right of entry incidental to the grant of the coal, which resides in his grantee. They are not tenants in common of the coal or of the surface, but each is a sole tenant of his own estate.

The case of *Wheeler v. Carpenter*, 107 Pa. 271, is relied on by the appellee, and seems to have been relied on by the learned judge as authority for the doctrine of the charge. The facts of that case were that the owner of land having pine trees standing upon it, sold the land, reserving the trees, and incorporated into his deed a reservation to himself of the "pine timber suitable for sawing," without fixing any limit of time for its removal. It might be practicable to distinguish that

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case from this upon its facts, but it is not necessary to attempt it. It was an action of trespass in which the jury found that the defendant cut trees not included in the reservation, and returned a verdict for single damages, which the court trebled. The question in this court was over the liability of the defendant to treble damages under the act of 1824, and the action of the Common Pleas was reversed, and judgment entered on the verdict for single damages. The plaintiff in error was represented by the Hon. Geo. A. Jenks, and the Hon. W. L. Corbit, both good land lawyers, and their position was that their client had an interest in the land by virtue of the reservation in his deed, which continued until his timber was removed, and gave him a right of entry to select, cut, and remove it. Having this interest in the land, they argued that he, like a tenant in common, was not within the letter or the purpose of the penal provisions of the act of 1824. This was the point ruled. The plaintiff below argued that this objection was removed by the act of 1869, which expressly provides that one tenant in common shall have every remedy in law and equity against his co-tenant who cuts timber belonging to them, without his consent, that he has against a stranger to the title. But this court decided that a remedy and a penalty were to be distinguished, and that giving the former did not, *ex vi termini*, carry the right to proceed for the latter. Whatever may have been said in elaborating them, the points adjudged were only those we have now stated.

Boults v. Mitchell, 15 Pa. 371, is in harmony with the doctrine of *Wheeler v. Carpenter*, although the point ruled is not the same. That was an action against the owner of the timber brought by a subsequent purchaser of the land. The defendant justified under the right of entry incidental to his ownership of the timber. The plaintiff alleged that the reservation of the timber was not good against him, and claimed title to it by virtue of his purchase of the land. The jury found against the plaintiff on the facts, and it was held that, having the title to the standing timber, the defendant had the right to enter and remove it. *The Six Carpenters' Case*, 8 Rep. 146 (a), 1 Sm. L. C. *216, really throws no light on our question. That was an action of trespass brought by a tavern-keeper to recover for wine and bread consumed by the six car-

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penters, for which they failed to pay. On demurrer, it was held that the action would not lie, and that the remedy of the tavern-keeper was in debt. Having entered the tavern lawfully for the purpose of procuring refreshment, the carpenters were not turned into trespassers by the omission to pay for what was furnished them. They had a right of entry. They entered for a lawful purpose. After entry, they committed no act of violence, and they were liable to pay for their entertainment as for any other debt contracted by them.

The statement in the first of the reporter's head-notes, in the case of *Wheeler v. Carpenter*, must be read in the light of the single question on which the case hung, viz., had the defendant such an interest in the land, by virtue of his reservation of the pine trees, as gave him a right of entry and took him out of the operation of the act of 1824? We held that he had an interest in the land which gave him a right of entry to select, cut, and remove his timber, and that, as a tenant in common would be protected by his right of entry, so the defendant was protected. But it is thought that the recent case of *Shiffer v. Broadhead*, 126 Pa. 260, is in conflict with *Wheeler v. Carpenter* and *Boults v. Mitchell*, and a glance at that case is therefore necessary. It was tried before a referee to whom the questions of fact and law were submitted. He found, as a fact, that the defendant did cut three hundred and fourteen trees that belonged to the plaintiff, without the consent of the owner. This finding, whether it should have been made on the evidence or not, was like a verdict, conclusive of the fact. The question of law before us was whether, upon this finding, the defendant was liable under the act of 1824. Our Brother STERRETT, who delivered the opinion of the court, very carefully put the findings of the referee in the foreground, and said, in effect, that the defendant was brought by them within the provisions of the act of 1824. In our case there is no verdict against the defendant, but the existence of his right of entry and the nature and extent of his interest in the standing timber and the land upon which it was growing, come directly to us for determination upon the construction of the contract under which he justifies. The view we have taken of that subject renders an examination of the several assignments of error unnecessary. This judgment must be affirmed, not

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upon the rulings of the learned judge before whom it was tried, but because the proper construction of the contract of 1850 requires it.

On looking over the testimony, we cannot escape the conviction that the several parties interested have heretofore understood the contract as we have construed it. Silas Billings left as the plaintiff tells us, six children besides herself to survive him. Her share of this large body of land was, as settled by the proceedings in partition, less than seven hundred acres. Seventeen years were occupied in removing the timber. After this was accomplished, sixteen years more passed, during which the heirs at law of Billings had the exclusive possession of their respective purparts of the land. Thirty-six years after the contract was written, this action was brought. A region comparatively inaccessible in 1850 had been in the meantime penetrated by railroads, and brought into nearness to markets. The value of land and of standing timber had increased to five or six or more times its value in 1850. After this extraordinary lapse of time, and the changes that have been wrought by it, we have, set up for the first time, the position that the contract should be construed as a reservation of all pine, norway, and oak logs, less then twelve inches in diameter at the smallest end, no matter how fit they may be for sawing, nor how merchantable according to the usages of the trade. As we are satisfied that the judgment is right, we ought not to reverse it because the reasons given by the learned judge are wrong.

The judgment is affirmed.

MARY S. LOGAN v. S. A. GARDNER ET AL.

APPEAL BY S. A. GARDNER FROM THE COURT OF COMMON
PLEAS OF WARREN COUNTY.

Argued May 7, 1890—Decided October 6, 1890.

[To be reported.]

1. As a disability imposed by law cannot be set aside or evaded by the acts of the party, a married woman can pass her title to real estate only in the statutory mode; wherefore, one claiming under a deed from a

136 588
142 445

136 588
163 57

136 588

25 SC 196

26 SC 198

136 588

31 SC 502

136 588

221 575

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married woman and her husband that is lost, must show that it contained all the statutory requisites.

2. The disabilities of infancy and coverture are separate and independent. The mere fact that they both occur in connection with the same act, does not give either any greater force than it would have had separately; accordingly, an infant feme-covert having properly executed a deed, the only objection to be met is that of infancy.
3. The weight of authority now is that the deed of an infant is voidable only; that the title passes by it, and will remain in the grantee until some clear act of disaffirmance by the grantor after coming of age, and that such deed may be affirmed by acts much less formal than would be required to avoid it, and clearly by an estoppel.
4. The dictum of Mr. Chief Justice GIBSON, in *Schrader v. Decker*, 9 Pa. 14, that the deed of an infant feme-covert is absolutely void, must be referred to the unsettled position of the law at that time; and the remark made in *Williams v. Baker*, 71 Pa. 476, that a ratification thereof must be by a re-acknowledgment after coming of age, is limited to ratification during coverture.
5. The doctrine of estoppel in pais has been very much expanded, in modern times, particularly in Pennsylvania; and, while silence, in ignorance of one's own right, or of another's expenditure under a claim of right, will not estop, yet mere silence, with knowledge, is evidence from which a jury may find an estoppel, on the ground that the knowledge created a duty to speak.
6. When a person under disability has made a deed which is voidable on account thereof, and after removal of the disability, the grantee, with the grantor's knowledge, made expenditures in placing improvements upon the land, it is not necessary, to estop from a disaffirmance of the deed, that the grantor should have positively encouraged the improvements.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and MITCHELL, JJ.

No. 341 January Term 1890, Sup. Ct.; court below, No. 6 March Term 1888, C. P.

On December 1, 1887, Mary S. Logan brought ejectment against S. A. Gardner and others, for three acres of land in Mead township. The defendants pleaded not guilty.

At the trial on January 9, 1890, the following facts were shown:

It being admitted that in 1871 the title to the land in dispute was in Lorenz Baldensperger, the plaintiff's father, the plaintiff, in her case in chief, put in evidence a deed for said land from Lorenz Baldensperger and wife to herself, dated

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June 1, 1871, and duly recorded. At the date of the deed the plaintiff was the wife of Theodore Reibenstein, and she was named therein as Mary S. Reibenstein. The writ in ejectment, with the sheriff's return of service on the defendants, and their appearance and plea, having also been put in evidence, the plaintiff rested.

The defendants presented testimony tending to prove that in September, 1872, the plaintiff and Theodore Reibenstein, her husband, executed, duly acknowledged and delivered, a deed conveying the land in dispute to J. K. Palmer, but that said deed was afterwards lost without having been recorded; that Palmer took immediate possession of the land, and built a dam and flume on it, which he used in connection with his tannery and saw-mill; that by subsequent conveyances his title became vested in Willard White, who, in 1878, granted to Palmer an oil lease; that this lease was assigned by Palmer to David Beaty, who, in June, 1880, sub-let the oil right to one Clemons; that in 1886 the Clemons lease became vested in the defendant Gardner, who, at the time the action was brought, was in possession of the land thereunder.

In rebuttal, the plaintiff's counsel put in evidence her own deposition denying that she ever executed and acknowledged any deed to Palmer, for the land in dispute, and presented testimony tending to prove that at the date of the alleged deed to Palmer she was between twenty and twenty-one years of age.

In reply to this, the defendants called witnesses whose testimony tended to show that, in 1880, Clemons, who was then the owner of the leasehold for oil production, expended from \$3,000 to \$3,500, in drilling two wells and erecting fixtures, etc., on the leasehold, these operations and expenditures being known to the plaintiff and without objection on her part. They also put in evidence the record of a proceeding by the plaintiff for a divorce from her husband, Theodore Reibenstein, for the purpose of proving that at the time when Clemons made the expenditures mentioned, the plaintiff was not under any disability by reason of coverture; the record showing that on October 8, 1881, she filed her libel in divorce, charging that by cruel and barbarous treatment her said husband had rendered her condition intolerable, etc., and compelled her to leave his home in Octo-

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ber, 1879, and that since that time he had entirely neglected to provide for her support and maintenance; and that upon this libel a decree of divorce was pronounced in her favor on July 31, 1882. It appeared, further, in the testimony, that, after this decree, the plaintiff remained discovert until November 28, 1882, when she was married to John Logan.

At the close of the testimony, the court, BROWN, P. J., charged the jury in part as follows:

To make a deed good to pass the title to land of a married woman, the law of the state requires that her husband should join with her in the deed, and that she should acknowledge it before some official authorized to take the acknowledgment of deeds; that such official should read, or otherwise make known to her the full contents of the deed, and that, upon an examination by the official, separate and apart from her husband, she shall declare, in substance, that she voluntarily and of her own free will and accord, did sign, seal, and as her act and deed deliver the same, without any coercion or compulsion of her husband; and the evidence that this has been done, consists of the certificate of the official upon or attached to the deed.

[The first question of fact to answer, from the evidence, is, did Mary S. Reibenstein and her husband, in the fall of 1872, join in the making of a deed for the land in suit to J. K. Palmer, and did Mrs. Reibenstein acknowledge the same before a justice of the peace, in the manner and form that I have stated as essential, and did the justice certify to the same.]³ The defendants assert that all of this was done. And they gave evidence of the existence and loss of the deed, deemed by the court sufficient to let in parol evidence of its contents and acknowledgment. . . . On the other hand, the plaintiff denies that she ever made or acknowledged the deed. . . .

[If Mrs. Reibenstein never made and acknowledged the deed to Palmer, then you need proceed no further; your verdict should be in favor of the plaintiff. But if she did make and acknowledge it, in the manner and form I have stated to be essential, and the justice so certified, then you reach another question.]³ viz.: Was Mrs. Reibenstein under the age of twenty-one years at the time of making the deed to Palmer? The plaintiff claims that she was, and hence the deed did not

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pass her title. This, we say to you, is the law, and is decisive of the case in the plaintiff's favor, unless other facts appear that in law defeat her recovery, to which I will call your attention presently. . . .

[If the plaintiff was, at the time of making the deed, of the full age of twenty-one years, and the deed was in fact made and signed by herself and her husband, and acknowledged in the manner and form as claimed by the defendants, and so certified by the justice, then your verdict should be for the defendants.]³ But, if she was under age, the deed was not good to pass her title to Mr. Palmer, and she is entitled to a verdict, unless she has done some act ratifying the conveyance that estops her from maintaining this action.

Has the conduct and acts of the plaintiff been such as to amount to a ratification of her deed made to Mr. Palmer when under the age of twenty-one years, or has her conduct been such as to estop her from setting up her title as against these defendants? With respect to this, we say that there is no evidence of any act or conduct of the plaintiff that tends to show any ratification by her of her deed, or that estops her from setting up her title against these defendants, until after she filed her libel in this court, asking for a divorce from her husband, Théodore Reibenstein. In her petition for a divorce, she states under oath, that her husband, by cruel and barbarous treatment, had rendered her condition intolerable and life burdensome, so that she was compelled to leave the home and habitation of respondent since October, 1879. If the facts so stated in her petition were true, then the plaintiff was no longer under disability, and her acts and conduct between the date of October, 1879, and her marriage to John Logan, on the 28th of November, 1882, are the acts and conduct of an unmarried person. . . .

If you believe the testimony, it appears that T. J. Clemons became the lessee of David Beaty, in June, 1880, and according to the testimony of Mr. Clemons, soon afterwards, his lease being for oil purposes, he went into the occupation of the premises in dispute, for that purpose. It appears that Mr. Kirberger became the assignee of a part of his interest in the lease. That soon after obtaining the lease, operations were commenced and money expended to the amount of from \$3,000 to \$3,500; that a building was erected for the occupancy of some person in the

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employ of the lessee, in the spring of 1881 ; he states that there were no improvements when he went into possession, but that the premises had been in pasture. The defendants claim that these improvements and expenditures were made with her knowledge, and under such circumstances, as amounts to the ratification of her deed to Palmer, if the same were made during the minority of the plaintiff.

So far as this question is concerned, we will dispose of it in the answers to the points that have been presented. . . .

The plaintiff requests the court to charge :

2. Where, as in this case, the alleged deed is claimed to have been lost, the proofs to show its existence and genuineness must be positive and convincing that the plaintiff actually signed, sealed, acknowledged and delivered a deed in the form prescribed by the statute for the conveyance of a married woman's separate real estate, in order to warrant the jury in finding that a valid deed in fact existed. That persons saw or had in their possession a writing, in form a deed, answering the description of a proper deed, bearing the names of the plaintiff and her husband, without proof of its existence, is not sufficient. The proofs must establish the fact that such writing was the genuine act and deed of the parties.

Answer: This point is affirmed, if by the words "positive proof" is meant, proof satisfying the jury of the facts set forth in the point.⁴

3. That a married woman has no capacity to convey her separate real estate, except in the precise mode prescribed by the statute, viz., by deed, signed by herself and her husband, and acknowledged before a proper officer, that she signed, sealed and delivered the same as her free act and deed, with knowledge of its contents, separate and apart from her husband, and without coercion or compulsion of her husband, as prescribed by statute ; and, unless the jury find that the alleged deed of the plaintiff for the land in controversy conformed to and contained all the essential requirements of the statute, such deed or alleged deed had no validity to pass the estate of the plaintiff in the land in controversy.

Answer: This point is affirmed.

5. That the deed of a minor feme-covert, or married female infant, is void and incapable of ratification ; nothing will suffice

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to operate as a conveyance of such minor feme-covert's estate except the execution of a new deed, acknowledged as prescribed by the statute.

Answer : This point is answered in the negative.

6. A married woman, who has contracted to convey her separate estate in other than the mode prescribed by statute, cannot be estopped from asserting her title by a receipt of the purchase money, nor by improvements made by the vendee, with her knowledge and encouragement.

Answer : This point is affirmed, provided the knowledge and encouragement alleged as an estoppel was knowledge and encouragement known and given during the disability of the marriage relation.

The defendants request the court to charge :

2. If the jury believe from the evidence that Mary S. Reibenstein and her husband, Theodore Reibenstein, made a deed, executed and acknowledged in lawful form, to J. K. Palmer, for the land in controversy in this suit, and that at the time of making such deed she was under twenty-one years of age, such deed was not void, but only voidable by her, and might be ratified by her after she became of full age.

Answer : This point is affirmed, so far as to say that it might be ratified by her after she became of full age and after the disability of the marriage relation had ceased.

3. If the jury believe from the evidence that Mary S. Reibenstein, while yet a minor, with her husband, Theodore Reibenstein, made a deed, executed and acknowledged in lawful form, to J. K. Palmer, for the land in controversy; that after she arrived at full age, from October, 1879, to the time of her divorce on July 31, 1882, her husband, Theodore Reibenstein, from causes entitling her to a divorce, neglected to provide for her; that she remained single from the time of her divorce from Reibenstein to the time of her marriage to Logan on November 28, 1882; that between the dates of October, 1879, and November 28, 1882, T. J. Clemons and Albert Kirberger, while claiming title to the land under the deed from her and her husband, in good faith expended a large sum of money in developing the land for oil by drilling two wells, erecting oil rigs, and in investing in oil-well machinery, and built one or more houses for use in the business of producing oil on the

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premises, with the knowledge of Mary S. Reibenstein, and without objection or protest from her or any claim of title on her part, then she is estopped from afterwards avoiding her deed to J. K. Palmer, and in such case she cannot recover.

Answer: This point is affirmed, provided and only provided, you find the facts as stated therein, and further find from the evidence that the plaintiff, with full knowledge of her rights, and with knowledge of the improvements and expenditures made on the premises, by her conduct acquiesced in and encouraged such improvements and expenditures.¹

4. If the jury believe the facts to be as recited in the preceding third point, then the jury may from such facts infer a ratification by the plaintiff of her deed to J. K. Palmer, and in such case she cannot recover.

Answer: This point we answer as the preceding one; affirmed, provided, and only provided, you find the facts as stated therein, and further find from the evidence that the plaintiff, with full knowledge of her rights, and with knowledge of the improvements and expenditures made on the premises, by her conduct acquiesced in and encouraged such improvements and expenditures.²

The jury returned a verdict for the plaintiff for the land described in the writ. A rule for a new trial having been discharged, judgment was entered on the verdict, whereupon, a nonsuit having been taken as to the other defendants, S. A. Gardner took this appeal, assigning for error:

1, 2. The answers to defendants' points.^{1 2}

3. The several parts of the charge embraced in []^{3 3 3}

4. The answer to plaintiff's point.⁴

Mr. D. I. Ball (with him *Mr. Charles H. Noyes, Mr. Watson D. Hinckley, Mr. William W. Wilbur, Mr. William Schnur, and Mr. Thompson*), for the appellant:

1. The error, appearing in the first and second specifications, is the doctrine that the plaintiff must have actively encouraged the improvements and expenditures, under the facts stated in the points and answers, in order to be visited with the effect of an estoppel or a ratification. In the circumstances set forth in her petition for a divorce, the plaintiff, under the

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act of May 4, 1855, P. L. 430, had the powers of a feme sole as to the disposition of her real estate : *Black v. Tricker*, 59 Pa. 13 ; *Wilson v. Coursin*, 72 Pa. 306 ; *Elsey v. McDaniel*, 95 Pa. 472 ; *Moninger v. Ritner*, 104 Pa. 298 ; *Ellison v. Anderson*, 110 Pa. 486 ; *Ewing's App.*, 101 Pa. 371 ; *Foreman v. Hosler*, 94 Pa. 418. There are instances in which a married woman may be estopped : *Couch v. Sutton*, 1 Gr. 114 ; *Bigham's App.*, 123 Pa. 262 ; and the distinction appears to be that estoppel does not operate against her, when her act is void under the disability of coverture, but that she may be estopped in cases where she can assert her rights.

2. In this case, the deed being in lawful form, the only disability affecting it was that of infancy ; and, on the removal of the disability of coverture, the plaintiff could affirm or disaffirm the deed after arriving at full age. While the deed of a married woman lacking the essential forms of law is absolutely void, an infant's deed is merely voidable, and until disaffirmed it operates to transmit the title : *Irvine v. Irvine*, 9 Wall. 617 ; *Drake v. Ramsey*, 5 Ohio 253 ; *Cresinger v. Welch*, 15 Ohio 156 (45 Am. Dec. 565). Lapse of time, in connection with her standing by in silent acquiescence, while the expenditures were made on this property, was evidence of ratification, and the plaintiff was estopped thereby from afterwards disaffirming her deed : *Irvine v. Irvine*, *supra* ; *Chapman v. Chapman*, 59 Pa. 214 ; *Miranville v. Silverthorn*, 48 Pa. 149 ; *Woods v. Wilson*, 37 Pa. 384 ; *Arnold v. Cornman*, 50 Pa. 368. As she had the rights of a feme-sole, her silent acquiescence ought to postpone her title without proof of actual encouragement.

3. With regard to the measure of proof necessary to establish the existence and contents of a lost deed, the court imposed upon the defendant too great a burden. No question of forgery was raised, and therefore, as the certificate of acknowledgment would have been sufficient proof of its execution, if the original deed had been produced, it was unnecessary, after we had proved the existence, genuineness and sufficiency of the certificate, to go further and prove the actual signing, sealing, acknowledgment and delivery. The effect of the instructions given by the court was to send the jury behind the certificate of acknowledgment, when that alone was the evidence of the deed, at least until the certificate itself was called in question.

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No point challenged the correctness or genuineness of the certificate, nor the sufficiency of the proof of it. In conclusion, we submit that the plaintiff ought not to be allowed any latitude beyond what the strict rules of law and evidence require.

Mr. H. H. Goucher (with him *Mr. W. V. N. Yates* and *Mr. James O. Parmlee*), for the appellee :

1. Positive proof of the due execution and delivery of a lost instrument, by the party to be affected by it, must be made, before evidence of its contents can be received : *Slone v. Thomas*, 12 Pa. 209 ; *Burke v. Hammond*, 76 Pa. 172 ; *Rousher v. Hamm*, 3 Brewst. 233 ; *McCredy v. Navigation Co.*, 3 Wh. 424 ; *Jack v. Woods*, 29 Pa. 375. There are four essential requisites of a deed conveying a married woman's real estate : signing, sealing, acknowledgment, and delivery, by both husband and wife, in the form prescribed by statute. If any of these be omitted, the deed is a nullity : *Innis v. Templeton*, 95 Pa. 262. Proof of one of these requisites will not prove another ; proof of each and all of them is necessary : *Miller v. Ruble*, 107 Pa. 395.

2. A married woman cannot be estopped out of her real estate, nor compelled to convey it by estoppel : *Glidden v. Strupler*, 52 Pa. 400 ; *Stivers v. Tucker*, 126 Pa. 74 ; *Quinn's App.*, 86 Pa. 447 ; *Buchanan v. Hazzard*, 95 Pa. 240 ; *Innis v. Templeton*, 95 Pa. 262 ; *Davison's App.*, 95 Pa. 394. Her knowledge of improvements and expenditures on the property will not estop her, even though she encouraged them. Nor will delay of a minor in bringing suit for land sold during minority, operate as an affirmation of the title by ratification : *Urban v. Grimes*, 2 Gr. 96 ; *Lenhart v. Ream*, 74 Pa. 59. An infant covert, on attaining majority, cannot ratify her deed except by a re-acknowledgment in the statutory form : *Williams v. Baker*, 71 Pa. 476 ; *Ledger L. & B. Ass'n v. Cook*, 6 W. N. 428. It is absolutely void : *Schrader v. Decker*, 9 Pa. 14 ; *Steger's Est.*, 3 W. N. 368.

3. It is claimed that from October, 1879, the date at which, as *Mrs. Reibenstein* alleged in her libel for divorce, her husband ceased to provide for her, until her second marriage, she was free from the disabilities of coverture, and was capable of being estopped by neglecting to assert a claim to this land.

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We submit that neither the act of February 22, 1718, 1 Sm. L. 99, nor that of May 4, 1855, P. L. 430, has the effect of dissolving the bonds of matrimony. They confer upon the wife certain specific rights and privileges, in the circumstances they mention, and suspend her disabilities only to the extent that is necessary to enable her to exercise those rights and privileges. Outside of this, she remains a married woman, under all the disabilities of the marital relation, until relieved therefrom by death or divorce. The plaintiff's disabilities, therefore, continued until her divorce on July 31, 1882. But all these considerations have been passed on by the jury.

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The defence was a deed from plaintiff and her husband, to which the reply was, first, a denial of the making of any deed; and, secondly, infancy at the date of the alleged execution. To this second point, the defence rejoined acts of ratification by estoppel. The cardinal facts, therefore, upon which the jury had to pass, were the execution of the alleged lost deed, the infancy of plaintiff at that time, and the acts of estoppel.

As a married woman, the plaintiff could only pass her title in the statutory mode. A disability imposed by law cannot be set aside or evaded indirectly by acts of the party: *Glidden v. Strupler*, 52 Pa. 400; *Grim's App.*, 105 Pa. 375; *Stivers v. Tucker*, 126 Pa. 74. The learned judge, therefore, correctly instructed the jury that if defendant had not proved the making and acknowledgment of the deed as required by the statute, they need not go further, but should return a verdict for plaintiff.

The appellant's third and fourth specifications of error complain that too strict a measure of proof was required as to the contents of the lost deed, and that proof of the certificate of acknowledgment alone was sufficient until the certificate was called in question. But the present contention would be more tenable if appellant had asked the court to say specifically that proof of the certificate was sufficient *prima facie* proof of the execution of the deed and of its contents, so far as they were recited therein. If the deed had been produced, it would have been necessary to show that it contained all the requisites for the conveyance of plaintiff's title; and a party claiming under a lost deed must be held to proof of the same requisites: *Krise v.*

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Neason, 66 Pa. 253. The general effect of the charge on this point was correct, and we do not think the jury could have been misled in any way by it. The third and fourth assignments of error are not sustained.

The disabilities of coverture and infancy are separate and independent, and the mere fact that they both occur in connection with the same act, does not give either of them any greater force than it would have had separately. If a deed duly acknowledged had been produced, it would have made an end of the question of coverture in the case, and proof of the deed to the satisfaction of the jury would be equivalent to its production. The statute makes no distinction between *femes-covert* of full age and those under age; its requirements are the same for all. If, therefore, the jury were satisfied that a deed had been made by plaintiff, the objection of coverture was avoided, and defendant had only to meet that of infancy.

The effect to be given to an infant's deed was long the subject of controversy, but the decided weight of authority now is that it is voidable only; that the title passes by it, and remains in the grantee until some clear act of disaffirmance is done by the grantor after coming of age. The different views are discussed by STRONG, J., in *Irvine v. Irvine*, 9 Wall. 617, 627, and the authorities are well collected in 10 Am. & E. Encyc. of Law, tit., "Infants," p. 649, etc. The law makes no distinction between the deeds of infants on account of sex; nor, as already said, is the disability of coverture made any greater or any different by the additional disability of infancy. They remain separate and distinct. The dictum of Chief Justice GIBSON, in *Schrader v. Decker*, 9 Pa. 14, that the deed, "being executed while the wife was an infant, is absolutely void," must therefore be referred to the unsettled position of the law at that time. The modern authorities are clearly the other way. The cases also show that the infant may affirm his deed by much less formal acts than would be sufficient to avoid it, and clearly by any act which amounts to an estoppel: *Irvine v. Irvine*, supra; *Wheaton v. East*, 5 Yerg. 41; *Bostwick v. Atkin*, 3 N. Y. 53; *Davis v. Dudley*, 70 Me. 236; *Wallace v. Lewis*, 4 Harr. (Del.) 75; *Tunison v. Chamblin*, 88 Ill. 378, 386; *Singer Co. v. Lamb*, 81 Mo. 221. The knowledge and certificate, even if in the strict statutory form,

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would not estop a feme-covert from showing her infancy at the time: *Williams v. Baker*, 71 Pa. 476. But, when it is said in that case, that she could not ratify a deed after coming of age, except by a re-acknowledgment in the mode prescribed by the statute, this must be understood as limited to ratification during coverture. As soon as she becomes discoverd, and of full age, she stands in the same position in regard to acts of estoppel in pais as other persons sui juris. In the present case, the plaintiff, in 1879, being then of full age, left her husband on account of his treatment, for which she subsequently obtained a divorce. The judge charged the jury, and we must assume rightly, upon the evidence, as that point is not now before us, that from 1879 to 1882 plaintiff was under no legal disability, and her acts and conduct, with regard to their effect upon her title, were those of an unmarried person, and of course of a person of full age. But, in answering the defendant's points, the jury were told that, before they could find an estoppel, they must be satisfied that the plaintiff, with knowledge of her rights, and of the improvements and expenditures being made on the premises, acquiesced in and *encouraged* such improvements. This presents the only substantial question in the case.

The doctrine of estoppel in pais has been very much expanded in modern times, particularly in Pennsylvania, where equitable principles are applied in actions at law. The cases are very numerous, but it is not necessary to refer to more than a few of them. In *Woods v. Wilson*, 37 Pa. 379, the subject was discussed by Chief Justice THOMPSON, and it was held that silence, in ignorance of one's own right or of another's expenditures, will not estop, but that mere silence, with knowledge, is evidence from which a jury may find an estoppel. See, also, *Hill v. Epley*, 31 Pa. 331, and *Miranville v. Silverthorn*, 48 Pa. 147. These decisions rest on the ground that the circumstances were such as to raise a duty to speak, and that failure to do so is either a fraud, or would work such an injury as would be equivalent to a fraud, if the party should not be estopped. On the other hand, it was held as early as *Buchanan v. Moore*, 13 S. & R. 304, and *Robinson v. Justice*, 2 P. & W. 19, that positive acts of encouragement, or which help to mislead, will raise an estoppel, without any fraud and irrespective of the party's knowledge of his own rights. And, as was

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pointed out by Chief Justice GIBSON, this result rests on a different principle; that, of two innocent parties, the one who occasioned the loss must bear it. See, also, *Chapman v. Chapman*, 59 Pa. 214; *Miller's App.*, 84 Pa. 391; and *Putnam v. Tyler*, 117 Pa. 570, 586. The distinction, therefore, between the cases where acts or declarations of encouragement are necessary to create an estoppel, and those where mere silence or acquiescence will be sufficient, is one of principle, and each case as it arises must be assigned to one or the other class, according to its circumstances, the chief of which is knowledge or ignorance of the party's own rights and the other's action. Encouragement is necessary where the party is ignorant; but knowledge creates the duty to speak, and, where that exists, silence is enough to estop.

The present case belongs in the class of *Woods v. Wilson*, where silence, with knowledge of expenditures being made by the party in possession, may be sufficient to create an estoppel. The learned judge put it into the other class, by charging the jury that there would be no estoppel unless the plaintiff encouraged the improvements. Into this he was no doubt led by plaintiff's sixth point, that a married woman cannot be estopped by improvements made by the vendee, even with her knowledge and encouragement. This was properly affirmed as to knowledge and encouragement during coverture; but the same phrase, thus unfortunately suggested, was no doubt inadvertently carried into the answers to points relating to estoppel by conduct after the disabilities of coverture had ceased. This tended to mislead the jury into supposing that something more than mere silence, something active or positive on the part of plaintiff, was necessary to estop her, and, in so doing, it put a heavier requirement on defendants than the case justified. For this slip, in an otherwise clear and accurate charge, we are obliged to reverse the judgment.

Judgment reversed, and venire de novo awarded.

Statement of Facts.

C. C. DUFFIELD v. F. P. HUE ET AL.

APPEAL BY PLAINTIFF FROM THE COURT OF COMMON PLEAS
OF WARREN COUNTY.

Argued May 8, 1890—Decided October 6, 1890.

[To be reported.]

1. Under a lease which grants to the lessee for oil producing purposes a certain described tract of land, with the exclusive right of boring for oil thereon, but restricts the operations of the lessee to certain specified sites, the lessee has no right of possession, such as will support ejectment, as to any land outside the designated sites: *Duffield v. Hue*, 129 Pa. 94.
2. The lessee, however, has the protection of the entire premises, and equity has jurisdiction to restrain the lessor, or others acting under him, from drilling wells thereon outside of such designated sites, and thereby lessening the production of wells drilled by the lessee, such injury being destructive of his rights and incapable of adequate remedy at law.
3. A court of equity may entertain a bill for an injunction against such an interference with the lessee's rights, notwithstanding that the boundaries of the demised premises are disputed, the defendant, who also is in possession under the lessor, denying that the land upon which he is drilling was included by the lessor in the leasehold granted to the plaintiff.
4. The lessor of an oil lease being dead, in a controversy between one who had succeeded to his title and an assignee of the lessee, as to whether the leasehold estate had been forfeited, the lessee and his assignee were incompetent, both before and after the passage of the act of May 23, 1887, P. L. 158, to testify to a waiver of forfeiture by the lessor.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and MITCHELL, JJ.

No. 347 January Term 1890, Sup. Ct.; court below, No. 16 June Term 1886, C. P. in Equity.

On March 6, 1886, Charles C. Duffield filed a bill in equity against F. P. Hue and D. L. Gerould. The bill averred that on January 20, 1882, Thomas and H. W. Brown leased to one F. M. Pratt, for oil producing purposes, a part of tract 497 in Mead township, Warren county, which, however, by mutual mistake was described in the lease as part of tract No. 498.

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A copy of the lease was appended to the bill as an exhibit, and its subject matter was thus described therein :

“All that certain lot or piece of land, situated in the township of *Mead*, county of *Warren*, and state of *Pennsylvania*, bounded and described as follows, viz., being a part of tract number four hundred and ninety-eight, according to George O. Cornelius' survey, and containing an area of —, according to a division of said tract into numbered sites made by first said party, *each site situated on lots numbered respectively on map, one hundred and fifty-one Mill street, one hundred and ninety-three Centre street, one hundred and sixty and one hundred and thirty-four on Elston street, and also sites for three wells situated per plat number one, south side of Philadelphia and Erie Railroad, to be designated and mutually agreed upon by both parties,* to have and to hold the said premises unto the said party of the second part, *his* executors, administrators and assigns, for and during the term of *fifteen* years from the date hereof, with the sole and exclusive right and privilege, during said period, of digging and boring for oil and other minerals on said lot, and of removing the same, together with the right to put up and keep tanks thereon, and such other buildings as may be necessary to the production, storage and transportation of oil and gas. *It is understood that this lease includes no land south of Robert Thompson's line; and further said party of the second part to have the privilege of drilling on premises hereinbefore mentioned other wells, if said first parties determine to have more wells drilled, at the same terms and conditions mentioned in this lease,* upon the following terms and conditions, viz. :”

The words printed in italics were in writing in the original lease, the remainder of the foregoing extract being a printed form.

The bill averred, further, that Pratt, the lessee, entered in pursuance of the lease and drilled wells thereunder; that on December 16, 1883, by divers conveyances the plaintiff became the owner of the leasehold and entered into possession thereof, and thereafter he continued operations for oil thereon with the knowledge, consent and approbation of the lessors, and had upon the leased premises six producing wells, and was engaged in drilling a seventh, upon a location mutually agreed upon between the plaintiff and the agent of the lessors or their grantees. The bill then made the following charges :

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"6. And your orator avers that said defendants, with full knowledge of the possession of your orator and of the terms and conditions of said lease, and of his sole and exclusive right and privilege of drilling and boring for oil in said lot or land mentioned, and of his additional right and privilege of drilling other wells on said premises, should said lessors or their assignees or grantees so determine, under some pretended authority or right from said lessors or their assignees or grantees, as your orator is informed, have entered upon said land and premises and have located two wells and erected derricks and other buildings and structures thereon, and are drilling wells for the purpose of mining or producing oil therefrom, notwithstanding they were notified of the rights of your orator and ordered by him to desist and to leave said premises.

"7. That said defendants have persisted and still continue to persist in their trespassing on said premises, and have a well near completion which, if said defendants find oil in paying quantities, will, from its location, interfere with and materially injure the wells of your orator on said premises, and decrease the productiveness of his said wells, and may likewise, by any carelessness on part of defendants or their employees, cause irreparable injury to your orator's wells, and irreparable loss and injury to your orator's leasehold, and cause him to suffer such damage as cannot be estimated.

"8. Your orator further avers that the said defendants are trespassing upon his premises to the great and lasting injury of his estate therein and rights and property and contrary to law, and that unless defendants desist he has well founded reason to apprehend great injury and damage to his leasehold and its value to him; that the trespasses committed by defendants and the injury likely to result therefrom are liable to cause him irreparable injury, and such as will be permanent in its nature and character and be productive of lasting waste, and for all which there is no adequate remedy at law."

The prayers for relief were: For an injunction restraining the defendants from further drilling the wells commenced by them, and from further operating for oil upon the premises leased to the plaintiff, or interfering with his possession and enjoyment thereof; for an account for all waste committed by the defendants upon said premises, and a decree that the pro-

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ceeds of all oil which the defendants might obtain from said premises, prior to final decree, be paid to the plaintiff; and for general relief.

The defendants filed an answer to the bill admitting the lease from the Browns to Pratt and the mistake of description therein, mentioned in the bill, but averring upon information that any rights acquired by the plaintiff thereunder had been forfeited by reason of a failure to perform conditions therein contained; denying that defendants were drilling upon premises embraced in said lease, and averring that the wells which the defendants were drilling were located upon two acres of ground which formed no part of the Pratt lease, but were leased to the defendants on January 16, 1886, by Lewis Rosenzweig; and averring that the plaintiff had an adequate remedy at law for injuries that might result from any carelessness in the operation of the defendants' wells.

Issue having been joined, the court on April 5, 1886, appointed *Mr. D. I. Ball*, examiner and master, who subsequently reported in part as follows:

We are met at the threshold of this case with the question of jurisdiction. The defendants did not demur to the plaintiff's bill, but "at all times saving and reserving to themselves, and each of them, all benefit and advantage of exception which can or may be had to the many errors, uncertainties, and other imperfections in the said plaintiff's bill contained," they proceeded to answer the plaintiff's bill at length, and after replication the cause was proceeded with by testimony on both sides and argument before the master. Upon the argument, the defendants strenuously urged the want of jurisdiction in a court of equity to determine the questions raised by the plaintiff's bill.

The question of jurisdiction may be raised at any stage of the proceedings: *Musselman's App.*, 101 Pa. 165. While this is true, the court will not permit an objection to its jurisdiction to prevail, in doubtful cases, after the parties have voluntarily proceeded to a hearing on the merits, but will administer suitable relief: *Adams's App.*, 113 Pa. 449. And it seems this jurisdiction is to be determined by what appears on the face of the plaintiff's bill: *Adams's Appeal*, *supra*. If it be reasonably clear that a court of equity has no jurisdiction of the plaintiff's

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cause, then the court ought not to entertain it, and even the legislature could not clothe a court of equity with power to hear it, or deprive the defendants of their right to have a jury pass upon controverted questions of fact: *North Penna. Coal Co. v. Snowden*, 42 Pa. 492; *Tillmes v. Marsh*, 67 Pa. 508; *Norris's App.*, 64 Pa. 275; *Haines's App.*, 73 Pa. 169. It is settled beyond controversy that if the plaintiff's bill be but an ejectment bill, the court of equity has not jurisdiction, and the bill should be dismissed: *Tillmes v. Marsh*, *supra*; *Long's App.*, 92 Pa. 171; *Messimer's App.*, 92 Pa. 168; *North Penna. Coal Co. v. Snowden*, *supra*; *Gloninger v. Hazard*, 42 Pa. 389; *Washburn's App.*, 105 Pa. 480; *Schlecht's App.*, 60 Pa. 172.

What, then, is the character of the grievance alleged by the plaintiff? The sixth and seventh paragraphs of his bill charge the wrongs and injuries, alleged to be committed by the defendants, for which he seeks redress in this court as follows:

The sixth paragraph shows more than repeated and continued trespass; it shows an open, adverse and continued possession, and occupancy, and use of the premises by the defendants, under a claim of right from the plaintiff's lessor, in spite of the demand of the plaintiff upon them to desist and leave the premises. The trespassing, alleged in the seventh paragraph, is merged in the possession and occupancy already shown, and adds nothing more to the facts to be weighed in considering the question of jurisdiction.

Upon the face of the bill, a declaration in ejectment may be drawn. It sets forth the title in the plaintiff to the land in dispute, and his right to the possession thereof, and shows what is in fact an adverse occupancy of the same by the defendants. What does it signify that the plaintiff calls it trespassing, when he shows the act complained of to be an actual, open, continuous, indivisible, adverse and hostile possession and occupancy? In his own language, "they have entered upon said land and premises, and have located two wells, and erected derricks, and other buildings and structures thereon, and are drilling wells for the purpose of mining or producing oil therefrom. . . . That said defendants have persisted and still continue to persist in their trespassing on said premises, and have a well near completion." Clearly, so far, the plaintiff shows a wrong which

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can be remedied by an action of ejectment, and for which that action is the only remedy.

The further allegations contained in the seventh paragraph and the averments of the eighth paragraph are not sufficient to give jurisdiction. With the exception of the allegation of waste, the consequences of putting down these wells would be incident to any well drilled by the owner upon land adjoining plaintiff's lease, and close to any of his wells. I have never heard of any remedy at law being invoked for any injury sustained because of a well drilled close to the line upon the land of an adjoining owner. It is possible some injury might arise from the negligence or careless use or mismanagement of such a well to the owner of adjoining oil territory, for which the law might furnish a redress, but when can a court of equity intervene to prevent apprehended injury from carelessness of owners or employees in the management of oil wells upon adjoining lands, while prosecuting the business of producing oil in the usual and ordinary manner? Nothing else is made to appear upon this branch of the case, except that the land, upon which these operations are carried on, is in dispute between the plaintiff and defendants under what the plaintiff calls a "pretended" claim of right. The diminution in the production of oil to one person from the well of another, close to the boundary line, furnishes no ground for either a legal or equitable remedy.

One more element of the plaintiff's case upon the subject of jurisdiction remains for consideration, the question of waste. Whatever oil may be taken by the defendants from the disputed premises is so much taken from the corpus of the estate. But is the taking of it, in the manner charged, such waste as to give jurisdiction to a court of equity? In Grubb's App., 90 Pa. 234, it is said that "waste is spoil or destruction done or allowed to be done to houses, woods, lands or other corporeal hereditaments by the tenants thereof, to the prejudice of the heir, or of those in reversion or remainder." See also Denny v. Brunson, 29 Pa. 382. The injuries complained of do not seem to come within that technical meaning of waste, which courts of equity have jurisdiction to restrain the commission of. But it was well argued before the master, that, from the nature of oil and the character of oil lands, courts of equity are called upon to exercise their efficient powers to protect the owners of that kind of

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property from injuries to their estate in the nature of waste. These considerations have moved the legislature to apply more effective remedies for this kind of property. Those remedies, however, do not affect our question of jurisdiction. The Supreme Court have said, when appealed to upon these considerations, "We can draw no distinction between a farm and an oil well." "It may be that the peculiarity of the property in an oil well is such that an injunction to stay waste, or a writ of estrepement, will not be an adequate remedy for an owner out of possession. But that will not authorize a court of equity to assume jurisdiction to try the title upon what is merely an ejectment bill, and thus, in effect, deprive the parties of their constitutional right of trial by jury:" Enterprise Transit Co.'s App., 9 W. N. 227.

Allison's App., 77 Pa. 221, is confidently cited by the plaintiff as an authority for maintaining this bill. At the first blush, it appears to go the full length of sustaining all that the plaintiff asks for. Upon a closer examination, I think it is distinguishable from this case. In that case, the plaintiff had a lease for oil purposes of three acres and one hundred and twenty-three perches of land. The lease contained the following stipulation: "And it is further agreed between said parties that there are ten rods of protection on the east side of said lease, also protection on the north side eight rods to orchard fence." At the point at the corner of this lease where the lines of this protection met, a subsequent other lessee of this lessor bored an oil well. The bill filed was for an injunction restraining the further operation of this well and for an account of the oil produced, both of which were sustained by the Supreme Court. It is apparent that while Evans and Allison had a right to the "protection" provided by their lease along the sides of their leasehold, and that no other person should operate thereon for oil, they had no right to the possession of it. Without a right of possession they could not maintain ejectment, which is founded upon the right of possession. The "trespass" mentioned by Justice WILLIAMS, at page 227, would seem to be the tort arising from the violation of the terms of the lease by the lessor or parties under him. This being so, equity was the only adequate remedy for Evans and Allison. If I am correct in this analysis of that case, then Allison's Appeal is not an authority to govern this case.

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If we turn to the defendants' answer, there is nothing to help the plaintiff out on the question of jurisdiction. On the contrary, the answer contains a square denial of the plaintiff's rights in the land in question.

For the foregoing reasons, I am constrained to recommend to your Honors the dismissal of the plaintiff's bill. In doing so, it is proper that some portion of the costs made with and since the filing of the answer should be paid by the defendants, since, instead of demurring to the plaintiff's bill, they answered it and proceeded to proofs and final hearing. The plaintiff might well suppose that under such circumstances they accepted his challenge in the tribunal he had selected. If he made a mistake in his selection, they contributed to it in the proceedings subsequent to the filing of the bill, by their answer. I think they have no just cause for complaint if they are let off with one half the costs, beginning with and subsequent to the filing of their answer; and I think in compliance with approved practice they should in the first instance pay all the costs, with a right to collect over from the plaintiff all but the one half above indicated: Thomson's App., 11 W. N. 414; Lowenstein v. Biernbaum, 8 W. N. 301; Girard N. Bank's App., 13 W. N. 102; St Joseph's Orphan Asylum's App., 38 Pa. 585.

I might with propriety consider my duties as master as ending here upon preparing a decree. But if in the subsequent prosecution of this case, I should be convicted of error in recommending a dismissal of the bill, it is right to the parties and to the court that I pass upon all the questions raised by the pleadings and evidence in the case. . . .

By lease dated January 20, 1882, Thomas Brown and Henry W. Brown executed to F. M. Pratt the lease set forth in full by plaintiff as exhibit A to his bill. It is admitted that the number of the tract described in the lease as 498, is in fact 487, and that the title and possession of the Pratt lease is in C. C. Duffield, the plaintiff, and was at the time of bringing this suit, subject to the terms and conditions of the lease. It is further admitted that the Elston leasehold, of which the premises in question form a part, was sold by the sheriff to L. Rosenzweig upon certain writs of execution issued upon the judgments given in evidence against Thomas Brown, and Thomas Brown and others, doing business as Brown Brothers

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& Co., and that the title of the Browns in the Elston lease was in L. Rosenzweig, at the time of the execution of the lease to Hue and Gerould, the defendants. This later lease bears date January 16, 1886, and is for about two acres of land, which the plaintiff claims is included in the Pratt lease, and which the defendants deny. Both parties therefore claim from the same source of title, and one of the questions they present to me is the construction of the Pratt lease as to the extent of the territory covered by it. . . .

—The master then found that upon a proper construction of the description in the Pratt lease, it embraced, not only the sites designated for wells, but the whole of the tract embraced in the lease as far as the line of the Robert Thompson land mentioned therein, and therefore included the two acres, known as the mill lot, claimed by the defendants, and proceeded:

The defendants further contend that the plaintiff, under the terms of his lease, forfeited all rights under the lease, except to the six wells drilled on six of the sites mentioned therein, because the seventh well was not drilled within the time required by the lease. The consideration of this question of forfeiture requires the determination of the competency of certain witnesses who testified upon the subject, and in this connection I will consider the questions raised as to the competency of the witnesses, F. M. Pratt, C. C. Duffield, L. Rosenzweig and Thomas Brown, generally, under the act of May 23, 1887, P. L. 158.

The testimony in chief of the plaintiff was taken prior to the passage of said act, and the remaining testimony was taken after its passage, and the case argued before the master after the act went into effect. There were eighty-two pages of testimony taken prior to the time when the act went into effect on July 1, 1887. The act, by the terms of § 12, applies to the testimony taken before its passage, as well as to that taken after the act went into effect and while the proceedings were pending and undetermined.

H. W. Brown, one of the plaintiff's lessors, died before the beginning of this suit. The time of his death does not appear in the evidence, but it was before number seven well was drilled, and apparently about the time of the sheriff's sale. How does his death affect the competency of the witnesses

Master's Report.

named? Clause (c), § 5, of the act of May 23, 1887, provides: "Nor where any party to a thing or contract in action is dead, ... and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be *adverse* to the said rights of such deceased party, be a competent witness to any matter occurring *before* the death of said party." This act does not exclude any witness from testifying to matters occurring since the death of the party to the thing or contract, nor to transactions occurring between the surviving partner to the thing or contract; and apparently it does not exclude any one not a party to the thing or contract, although interested, from testifying in favor of the interest of the deceased party. It does exclude parties to the thing or contract, or who have an interest adverse to the deceased party, from testifying to any matter occurring before the death of such party. These rules manifestly exclude Mr. F. M. Pratt, Mr. C. C. Duffield, the plaintiff, and Mr. Thomas Brown, a witness for the defendants, in so far as their testimony relates to matters taking place anterior to the death of H. W. Brown; as to anything since that event they are competent. The act does not exclude Mr. Rosenzweig's testimony, as his connection with the lease and the subject matter of his testimony are subsequent to the death of H. W. Brown.

—Recurring to the question of forfeiture, raised by the defendants, the master reported, in substance, that the plaintiff's rights under his lease, except as to the wells drilled and a proper amount of territory in connection with each of them, to be set off by the lessor in accordance with its stipulations, had been forfeited by a failure to comply with certain conditions thereof. He therefore reported, recommending a decree dismissing the plaintiff's bill, without prejudice to his right to prosecute a suit at law, and directing that the costs be paid in the manner suggested in the previous part of his report.

The plaintiff filed exceptions to the report, alleging that the master erred: 1. In excluding the testimony of Pratt and the plaintiff.¹ 2. In not finding that the forfeiture of the plaintiff's lease was waived and suspended.² 3. In holding that a court of equity had no jurisdiction under the facts proved.³

Arguments.

On June 25, 1888, the exceptions having been argued, they were dismissed by the court and a final decree entered dismissing the plaintiff's bill and directing the costs to be paid as recommended by the master.* Thereupon in March, 1890, the plaintiff took this appeal, specifying that the court erred:

1-3. In dismissing the plaintiff's exceptions.^{1 to 3}

4. In dismissing the bill for want of jurisdiction.

Mr. Samuel T. Neill, for the appellant:

1. The real and only question raised upon this record is that of jurisdiction. The dismissal of the bill was recommended by the master, and ordered by the court, solely upon the ground that it was an ejectment bill. The plaintiff was then driven to an action of ejectment, which this court decided in *Duffield v. Hue*, 129 Pa. 94, could not be maintained, intimating that the plaintiff had a remedy in another form. To obtain that remedy, this appeal is taken. The plaintiff's lease, in plain terms, granted the exclusive right to the oil under the whole lot of which the Robert Thompson line was the southern boundary, although it gave no right to the possession of any of the surface, except the parts necessary for the drilling of the seven wells through which the oil was to be taken out. The fact that the defendants have adverse possession of the surface of the two acres, does not interfere with the jurisdiction of equity to restrain the drilling of wells thereon, which would create waste upon the plaintiff's oil right, and produce damages to him incapable of measurement: *Allison's App.*, 77 Pa. 221; *Westmoreland N. Gas Co. v. DeWitt*, 130 Pa. 235.

2. There is an additional reason for invoking the aid of

*Acting upon the suggestion of the master and the court below, that his remedy, under the averments of his bill, was at law and not in equity, *Duffield* brought ejectment against *Hue* and *Gerould*, on July 18, 1888, for the two acres claimed by them. In that action, the court, in pursuance of a submission under the act of April 22, 1874, P. L. 109, rendered judgment for the defendants. On writ of error to No. 455 January Term 1889, Sup. Ct., the judgment was affirmed in an opinion by Mr. Justice CLARK, holding, among other things, that ejectment could not be maintained by *Duffield*, inasmuch as his lease gave him no right of possession except at the sites for wells therein mentioned: *Duffield v. Hue*, 129 Pa. 94. This appeal from the decree in the equity case was not taken until after the decision of the Supreme Court, in the ejectment suit, was rendered.

Arguments.

equity. There is an express covenant in the lease held by the plaintiff, that any additional wells drilled upon the leased premises should be drilled by the lessees, and this covenant was clearly intended to protect their wells against the drilling of any wells by the lessors, or others claiming through them, upon the land of which the defendants are in possession. The covenant was binding upon Rosenzweig and the defendants, as well as upon the Browns; and equity has full jurisdiction to restrain the violation of such a restrictive covenant: *Brightly's Eq.*, §§ 294, 295; *Stewart's App.*, 56 Pa. 422; *Scott v. Burton*, 2 Ashm. 325; *Allison's App.*, 77 Pa. 221. The question of forfeiture does not properly arise on this record, but the ruling of the master upon it was clearly erroneous. He disregarded competent testimony which should have led him to a different conclusion, and he erred in treating the forfeiture clause in the lease as self-acting: *Wills v. Gas Co.*, 180 Pa. 222; *Hoch v. Bass*, 126 Pa. 13. Moreover, even if the plaintiff's right to drill the seventh well was forfeited, he was entitled by the terms of the lease to protection for the wells already drilled.

3. As to the competency of Pratt and Duffield, we do not ask the court to review its decision in *Duffield v. Hue*, 129 Pa. 94; but that decision was based upon the act of May 23, 1887, P. L. 158, and these witnesses testified in chief in this case before that act was passed. Besides, the purpose for which we seek to use their testimony here, is not the same as in the other case. If we were now seeking by it to reform the original contract, what was said in *Duffield v. Hue*, *supra*, would be applicable. But such is not the case. The defendants allege a failure of the plaintiff to comply with the strict terms of the lease, and set up a forfeiture resulting therefrom to themselves. Our offer to show waivers of strict compliance by Rosenzweig, and by the Browns when they were the owners of the property, was not in any sense adverse to Henry Brown's interest, and in no way affected his estate or any one but the defendants. They were claiming that the ground in controversy was not included in the contract between Pratt and the Browns, and had no standing to object. Pratt was a competent witness under the act of April 15, 1869, P. L. 30: *Warren v. Steer*, 112 Pa. 684; and we contend that he would have been such even prior to that act.

Opinion of the Court.

Mr. Charles Dinsmoor (with him *Mr. James Cable* and *Mr. Charles A. Peterson*), for the appellees :

1. The plaintiffs' bill is clearly an ejectment bill and discloses no ground for equitable relief. The record exhibits simply a contest over the legal title to the ground in the possession of the defendants. The charges in the bill of continuing trespasses in the drilling for oil, add nothing to the plaintiff's case. Such business does not consist of a series of entries, but of an actual, continuous, visible and adverse possession. Upon his own showing, the plaintiff can have no remedy except by an action at law to determine the title: *Washburn's App.*, 105 Pa. 480; *Long's App.*, 92 Pa. 171; *Schlecht's App.*, 60 Pa. 172; *Tillmes v. Marsh*, 67 Pa. 507; *Enterprise Transit Co.'s App.*, 9 W. N. 227.

2. Of *Allison's App.*, 77 Pa. 221, and *Westmoreland N. Gas Co. v. DeWitt*, 130 Pa. 235, upon which the plaintiff relies, it is sufficient to say that in those cases the title of the lessees was indisputable, and the rights invaded, or sought to be invaded, were incorporeal, or at least such as gave no right to the possession of the land out of which they sprang. The plaintiff attempts to bring this case within the two last mentioned, by setting up some kind of easement in the two-acre lot, under the clause in the lease giving the lessee the privilege of drilling any additional wells which the lessors might determine upon. The court below, in the ejectment case, affirmed a point to the effect that this clause is not a covenant running with the land, and this ruling was not reversed or discussed when that case came before this court in *Duffield v. Hue*, 129 Pa. 94. The clause in fact, is but a personal covenant binding only the lessors. It certainly does not bind one who came into possession of the lessor's rights by adverse legal process, as *Rosenzweig* did: *National Transit Co. v. Weston*, 121 Pa. 485. The other matters assigned for error and discussed by the appellant's counsel, are ruled by *Duffield v. Hue*, 129 Pa. 94.

OPINION, MR. JUSTICE CLARK:

The main question in this case is one of jurisdiction. The plaintiff's bill was dismissed upon this ground alone, and, as all matters affecting the merits were dependent upon the question of jurisdiction, they fell with it, and were not considered.

Opinion of the Court.

It is contended, and the learned judge of the court below was of the opinion, that, for the injuries complained of in the bill ejectment was the proper remedy, and the bill was dismissed as an ejectment bill. In this we think the learned court erred, for we cannot see how it was possible for the plaintiff to have maintained ejectment for the premises in dispute. Under the terms of the contract of 20th of January, 1882, neither Pratt nor his assignees were entitled to actual possession of the mill-yard, and, without the right of possession, ejectment could not be maintained. In *Duffield v. Hue*, 129 Pa. 94, which was an ejectment between the same parties for the same land, this contract was brought before us for construction, and we there held that ejectment could not be maintained. We there said:

“Whilst, by the printed form, the leased premises are described as ‘a certain lot or piece of land, situate,’ etc., it is plain from the written clauses that the premises were to be operated at certain designated points or sites only. These sites are specifically described as follows: ‘Each site situated on lots numbered, respectively, on map, one fifty-one Mill street, one ninety-three Centre street, and one sixty and one thirty-four on Elston street; and also sites for three wells, situated per plot number one, south side of Philadelphia & Erie Railroad, to be designated and mutually agreed upon by both parties.’ The rights of Pratt as lessee for oil-mining purposes are plainly restricted to these sites. It is provided that he is to have the privilege of drilling other wells on the same premises only in the event that the Browns might determine to have more wells drilled, and then the operations were to be conducted on the same terms. Whilst the lease, in some sense, may be said to cover the entire lot for oil-mining purposes, yet it is plain that operations were restricted to the sites mentioned. Whatever oil might be produced from the premises leased at these points, the lessees had a right to produce; but they had no right of possession, for any purpose, at any other place within the bounds of the territory described. If the lessors, or others acting under them, by boring other wells, lessened this production, or otherwise disturbed or interfered with the rights of the lessees, they may have had their remedy, but not in this form; for by no construction of the contract in question can Pratt be supposed to have had any right of possession, for any purpose,

Opinion of the Court.

in any part of the premises in dispute ; and Duffield, in his right, has therefore no standing to recover in ejectment."

As the decree in this case was entered before the final judgment was given in *Duffield v. Hue*, *supra*, the learned judge did not have our construction of this contract before him, and, as he appears to have adopted a different construction of the contract, he arrived at a different conclusion as to the remedy to be pursued.

It is plain that in some sense the whole land is embraced in the lease, for the description covers the whole. The lease is of "a certain lot or piece of ground situate," etc., "being part of a tract number four hundred and ninety-eight (497) according to George O. Cornelius' survey, and containing an area of—, according to the division of said tract into numbered sites," etc. The grant is of the sole and exclusive right and privilege, during said period, of digging and boring for oil and other minerals "on said lot," etc., which, however, "includes no land south of Robert Thompson's land," etc.; the party of the second part to have the privilege of drilling other wells "on premises hereinbefore mentioned, if," etc. It is equally plain, however, notwithstanding the lease covers the whole, that the actual possession or occupancy for oil production is confined to certain "sites," for the sites are particularly specified, and, in a certain contingency, others provided for. Pratt, the lessee, although thus limited in his actual operations, had the protection of the entire premises, and the privilege of extending his operations within the limits of the lease as the lessors might determine. The right was "exclusive," by the express words of the contract, and was confined to these sites, unless "the first parties determined to have more wells drilled, in which case the parties of the second part have the privilege of drilling them on the same terms and conditions mentioned." The complaint is not that the defendants have invaded the possession of the plaintiff, nor that they have entered at any point where the plaintiff is entitled to possession, but that they are interfering with the plaintiff's exclusive right to the oil.

The sixth and seventh paragraphs of the bill are as follows :

"6. And your orator avers that said defendants, with full knowledge of the possession of your orator and of the terms

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and conditions of said lease, and of his sole and exclusive right and privilege of drilling and boring for oil in said lot or land mentioned, and of his additional right and privilege of drilling other wells on said premises, should said lessors or their assignees or grantees so determine, under some pretended authority or right from said lessors or their assignees or grantees, as your orator is informed, have entered upon said land and premises and have located two wells and erected derricks and other buildings and structures thereon, and are drilling wells for the purpose of mining or producing oil therefrom, notwithstanding they were notified of the rights of your orator, and ordered by him to desist and to leave said premises.

"7. That said defendants have persisted, and still continue to persist, in their trespassing on said premises, and have a well near completion, which, if said defendants find oil in paying quantities, will, from its location, interfere with and materially injure the wells of your orator on said premises, and decrease the productiveness of his said wells, and may likewise, by any carelessness on the part of the defendants or their employees, cause irreparable injuries to your orator's wells, and irreparable loss and injury to your orator's leasehold, and cause him to suffer such damage as cannot be estimated."

The defendants, having taken possession of the mill site for the purpose of boring for oil, could not be dispossessed by ejectment, nor was trespass an adequate remedy. It was, without doubt, proper for the plaintiff, if his claims are justified by the proofs, to resort to equity for redress. The injury threatened was of a permanent nature, and destructive of his rights under the Pratt lease. The damages anticipated were incapable of measurement at law. The court below had undoubted jurisdiction for the prevention and restraint of the defendants, and for redress of the injuries suffered: *Allison's App.*, 77 Pa. 221; *Westmoreland N. Gas. Co. v. DeWitt*, 130 Pa. 235.

As to the incompetency of Pratt and Duffield to testify as witnesses for the plaintiff as to matters occurring in the lifetime of Brown, there can, we think, be no serious question; they were incompetent under the act of 1887: *Duffield v. Hue*, *supra*, and it is equally clear that they were incompetent

Syllabus.

prior to that act, under the ruling of *Karns v. Tanner*, 66 Pa. 297.

For the reasons already stated,

The decree of the Common Pleas is reversed,
and the record remitted for further proceeding,
the appellee to pay the costs of this appeal.

MARY L. TITUS v. BRADFORD ETC. R. CO.

APPEAL BY DEFENDANT FROM THE COURT OF COMMON PLEAS
OF McKEAN COUNTY.

Argued May 9, 1890—Decided October 6, 1890.

[To be reported.]

1. From the fact that a particular method or appliance is dangerous, it does not follow that it is negligence for an employer to use it. Some employments are essentially hazardous; and the unbending test of negligence, in methods, machinery and appliances, is the ordinary usage of the business.

2. An employer performs his duty when he furnishes appliances of ordinary character and reasonable safety, and the former is the test of the latter. For, in regard to the style of the implement, or the nature of the mode of performance of a work, "reasonably safe" means safe, according to the usages, habits and ordinary risks of the business.

(a) In an action for the death of a brakeman, the negligence charged was the use of a particular broad-gauge car body upon a narrow-gauge truck, not adapted thereto. The carriage of broad-gauge cars upon narrow-gauge trucks, was a part of defendant's ordinary business, and cars like the one referred to had been carried quite often:

3. In the absence of proof that the carrying of this car, in the manner complained of, was an unusual occurrence on the road of defendant company, and the plaintiff's testimony showing that the brakeman accepted his employment with full knowledge of the practice of thus carrying such cars and the risks incident thereto, there could be no recovery for the injuries received.

Before PAXSON, C. J., GREEN, CLARK, WILLIAMS and MITCHELL, JJ.

No. 13 July Term 1890, Sup. Ct.; court below, No. 8 December Term 1888, C. P.

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Statement of Facts.

On October 1, 1888, Mary L. Titus brought trespass against the Bradford, Bordell & Kinzua Railroad Company, to recover damages for the death of the plaintiff's minor son. Her statement of claim averred that her said son, James Titus, on June 7, 1888, was in the employ of the defendant as a brakeman, and engaged in the performance of his duty as such on a freight train; that in making up said train, the defendant negligently placed therein one or more broad-gauge cars, set on narrow-gauge trucks, and so heavily loaded as to be top-heavy, and negligently used on said car or cars "an unsafe, and not the best appliance, to wit, the flat centre plate," and by reason thereof the car overturned, and, falling upon the said James Titus, crushed him so that he died, etc. The defendant pleaded not guilty.

At the trial on February 13, 1890, the following facts were shown:

The defendant was operating a narrow-gauge railroad between Bradford and Smethport, with branch lines to Kane and Eldred. At all the points named, the defendant's road connected with standard-gauge railroads, and a customary part of the defendant's business was the transportation over its road of loaded and unloaded freight cars belonging to such connecting roads. The means of effecting this was to transfer the car bodies, by a mechanical appliance known as a "hoist," from the standard-gauge trucks belonging to them to narrow-gauge trucks of the defendant. The testimony tended to show that it was usual on other narrow-gauge railroads to make such transfers of car bodies in the same way.

Among the roads, whose cars the defendant was in the habit of receiving and transporting, was the New York, Pennsylvania and Ohio Railroad, known as the "Nypano." The construction of those cars differed somewhat from most of the standard-gauge cars handled by the defendant. The centre plates of the bolsters on the bottom of the Nypano cars were partially oval, shaped somewhat like the bottom of a common saucer, and fitted into correspondingly shaped centre plates on the bolsters of the trucks. The car bolsters were of iron, so shaped as to be eight or ten inches higher at their ends than in the middle.

Most of the standard car bodies handled by the defendant

Statement of Facts.

were from the Erie railroad, and had bolsters not unlike the bolster of a common farm wagon; but Nypano cars, with bolsters of the shape described above, were handled quite often. The defendant used what were called Hays trucks, fitted for carrying standard-gauge cars on narrow-gauge roads. The bolsters of these trucks, however, were straight from end to end, and had flat centre plates, and when a Nypano car body was placed on one of those trucks, the side bearings of the car and of the truck, respectively, would be about three inches apart. The result of this would be to permit the car to rock unduly when rounding a curve, and to guard against this, blocks of hard wood were fastened on the truck bolsters, sometimes being bolted on and sometimes secured by wrapping telegraph wire around them and the bolsters.

James Titus, the plaintiff's son, was employed by the defendant, for several months during the years 1887 and 1888, about the hoist at Bradford, and was familiar with its operation, having assisted in the transfer of cars from their own trucks to the defendant's trucks. In the spring of 1888 he went upon the defendant's road as a brakeman. On June 7th, of that year, he was on duty as one of the brakeman of a freight train passing over the defendant's road from Ormsby junction to Bradford. A Nypano car, No. 41,036, was taken into this train at Ormsby junction. Before this was done, the car was inspected by the conductor of the train and found to be in good order, so far as he could see. The truck bolsters had blocks on them secured by telegraph wire. The car was loaded with ground bark, put up in bags. This same car had been hauled over the road to Ormsby junction, about ten days before, in a train upon which Titus was serving as a brakeman. While on its way to Bradford, on the day given, the train was passing around a curve, at the rate of seven to ten miles an hour, when car 41,036 was observed to sway from side to side and afterwards to bounce as if off the rails. Titus had been sitting on the brake wheel on the top of the car, at its rear end. When it commenced to rock he started to run along the top of it, to get to the car in front, but before he could get that far, the car tipped over. He then jumped to one side and, falling on the track, was run over by the rear truck of the car and killed. After the accident, an examination of the trucks that had been

Charge of Court below.

under car 41,086, disclosed the fact that the wire fastening of one of the blocks had become loose, and the block had moved around so as to be partly out of place.

C. H. Morris, one of the plaintiff's witnesses, being asked to state whether or not a Nypano car upon a narrow-gauge truck, such as the one with which this accident occurred, was safe, answered: "A. Well, I had my doubts in regard to the plates of this truck. There have been many Nypano cars hoisted over and come back safe, but I never had any experience where the plate was like that, and I expressed my doubts that it would be safe. Q. State whether or not you think it was safe? A. In my opinion it was not."

One of the defendant's witnesses testified: "Q. Would you regard a train, made up of narrow trucks and wide gauge body, running over a road full of curves, and hilly, as safe as though they were narrow ones? A. No; I don't think it is as safe."

At the close of the testimony the court, OLMSTED, P. J., charged the jury in part as follows:

In a case of this kind, before a recovery can be had, it must be shown affirmatively, by competent evidence, that the accident occurred from the company's negligence, not contributed to by the deceased. . . .

We have been requested to answer points for both sides, and we will do so now; for the plaintiff first.

1. Every one entering the employment of another has a right to assume that his employer has been guilty of no negligence, by himself or his agents, as to those things under his control which may affect the safety of such employee, and that he has omitted the performance of no duty in respect thereto which should have been observed by an ordinarily careful and prudent man. He has a right to assume this, and is not put to any particular investigation or inquiry.

Answer: We affirm this point.¹

2. The master owes to every employee the duty of providing a reasonably safe place in which to work, and reasonably safe tools and machinery with which to work. This is a direct personal obligation.

Answer: We affirm this point.²

3. Ignorance in the master of defects in the instrumentalities

Charge of Court below.

used by his servants, in performing his work, is no defence to an action brought by an employee who has been injured by them, when, by the exercise of proper care, the master could have discovered and remedied the defects.

Answer: We affirm this point.³

4. What is negligence and what is ordinary care must be submitted to the jury, if there be any dispute or reasonable doubt as to the facts claimed to establish the alleged negligence, or as to the inferences to be drawn therefrom.

Answer: We affirm this point.⁴

On behalf of the defendant we have been asked to charge you as follows:

2. The plaintiff having failed to show that the accident, in which the boy was killed, was caused by the negligence of the defendant, there can be no recovery in this case, and the verdict should be for the defendant.

Answer: We answer this point in the negative, as a general proposition.⁵

3. The evidence showing that James Titus, the boy killed, had an opportunity of knowing and did know,—having been employed on the hoist and as brakeman for several months,—the risks incurred in the use of these cars, and, by continuing his employment thereunder, accepted such risks, there can be no recovery in this case and your verdict should be for the defendant.

Answer: As a whole, connected proposition, we answer this point in the negative.⁶

4. That under all the evidence in this case, there can be no recovery by the plaintiff, and the verdict must be for the defendant.

Answer: We answer this point in the negative, because it is asking us to withdraw the case entirely from the jury, and we propose to submit some questions of fact to the jury.⁷

Now, gentlemen, it was the duty of this company to furnish for its employees a reasonably safe railroad track, suitable and reasonably safe cars, machinery and appliances. They were not required to furnish the very best that could be obtained. They must be suitable; such appurtenances as are used by persons of ordinary care and prudence; such as such persons do furnish to their employees.

Charge of Court below.

The contention of the plaintiff in this case is, that the company was negligent in using on this narrow-gauge road these standard car bodies, and particularly that it was negligent in using the New York, Pennsylvania & Ohio car body, described by the witnesses, constructed as it was at the time of the injury. You have heard the evidence. It has been somewhat lengthy upon this point, describing the method of the construction of the bolsters of this New York, Pennsylvania & Ohio car. And you have heard how it was fitted on the bolster of the narrow-gauge truck? Did the car tip over on the 7th of June, on account of the ill-adaptation of this car body to the truck? Were they safely and carefully secured each to the other, so as to operate together as a whole? Was the defendant ordinarily careful and prudent in using this car under the circumstances? If it was dangerous to use it under the circumstances, was it known to be dangerous by the deceased, without complaint to his employer? If he did know it, that it was dangerous, but continued in the service of the company, he assumed the risks and no recovery can be had. . . .

Did this car tip over there, at that time, by reason of the ill-adaptation of these cars to each other, by the extraordinary width of the New York, Pennsylvania & Ohio car body, and was there a defect in the blocking between these bolsters, in such a way as to make it not safe and ordinarily prudent to use it? If it was safe, there can be no recovery here; but if you should find that it was not ordinarily safe, to use a car body of that size upon a truck of that width, with such a load as was there, and that it was not properly and carefully secured to keep it from rocking and tipping over, and it tipped over from that cause, you might find that the accident was occasioned by the negligence of this railroad company.

But, if that was all true; if it was negligence of this company, did the deceased know that it was dangerous, and did he thereby assume the risk; or, was this one car especially dangerous, more than others? He may have known very well that they were in the habit of using standard bodies on the narrow-gauge trucks, and not considered that as especially dangerous; but, was this car more dangerous than others of that kind, and did he have knowledge that this one was dangerous, if he supposed the others were safe? If he knew this car was danger-

Arguments.

ous, and continued to assist in the transportation, and remained there, he cannot recover.

The whole question of negligence is for the jury, as we understand it. . . .

The verdict of the jury was in favor of the plaintiff for \$325. Judgment having been entered thereon, the defendant took this appeal, assigning for error:

1-4. The answers to plaintiff's points.^{1 to 4}

5-7. The answers to defendant's points.^{5 to 7}

Mr. M. F. Elliott (with him *Mr. D. H. Jack* and *Mr. D. L. Roberts*), for the appellant:

1. An employer has discharged his duty to a servant when he has furnished tools and appliances which, though not the best possible, may by ordinary care be used without danger; and having done this, he is not responsible for accidents: *Pittsb. etc. R. Co. v. Sentmeyer*, 92 Pa. 276; *Northern C. R. Co. v. Husson*, 101 Pa. 1; *Payne v. Reese*, 100 Pa. 306; *Schall v. Cole*, 107 Pa. 1; *Lehigh Coal Co. v. Hayes*, 128 Pa. 294; *Phila. etc. R. Co. v. Keenan*, 103 Pa. 124. By reason of the voluntary character of his engagement, the servant must be held to have assumed the risks of danger to himself that are necessarily incident to the character of the service: *Payne v. Reese*, *supra*; *Lehigh Coal Co. v. Hayes*, *supra*; *Caldwell v. Brown*, 53 Pa. 453. The court, by its answer to the plaintiff's third point, undertakes to say that the master is responsible for all defects in the instrumentalities used by the servant, although he may have provided competent servants to inspect them who have neglected to perform their duty. This is erroneous: *Sykes v. Packer*, 99 Pa. 465; *Patterson's Ry. Acc. Law*, 367.

2. An employee, who has had an opportunity to become acquainted with the risks of his situation and continues in the employment, thereby accepts those risks and cannot complain if subsequently injured by exposure to them: *Brossman v. Railroad Co.*, 113 Pa. 490; *Rummell v. Dilworth*, 111 Pa. 348. If the machinery furnished contain obvious defects, of which the servant knows or as a reasonably prudent man might know, he cannot recover for injuries resulting therefrom: *Schall v. Cole*, 107 Pa. 1; *Sykes v. Packer*, 99 Pa. 465; *Ryan v. Rail-*

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road Co., 23 Pa. 384. If the defect be of such a character, or occur at such a time, that the master cannot reasonably be expected to have knowledge of it, it is the servant's duty to give him notice, and the neglect of such duty exempts the employer from responsibility: *Patterson v. Railroad Co.*, 76 Pa. 389. The burden was upon the plaintiff to show against the defendant a case of negligence clear of any contributory negligence on the part of the deceased, and as she did not do this, the court should have directed a verdict for the defendant: *Lehigh Coal Co. v. Hayes*, 128 Pa. 294; *Phila. etc. R. Co. v. Hughes*, 119 Pa. 301; *Phila. etc. R. Co. v. Schertle*, 97 Pa. 450; *Pittston Coal Co. v. McNulty*, 120 Pa. 414. When the facts are not disputed, the question of the defendant's negligence is for the court: *Koons v. Telegraph Co.*, 102 Pa. 164.

Mr. Eugene Mullin, for the appellee, presented no paper-book.

OPINION, MR. JUSTICE MITCHELL:

We have examined all the testimony carefully, and fail to find any evidence of defendant's negligence. The negligence declared upon is the placing of a broad-gauge car upon a narrow-gauge truck, and the use of "an unsafe, and not the best appliance, to wit, the flat centre plate;" or, as expressed by the learned judge in his charge, in using on the narrow-gauge road the standard car bodies, and particularly the New York, Pennsylvania & Ohio car body described by the witnesses. But the whole evidence, of plaintiff's witnesses as well as of defendant's, shows that the shifting of broad-gauge or standard car bodies on to narrow-gauge trucks for transportation, is a regular part of the business of narrow-gauge railroads, and the plaintiff's evidence makes no attempt to show that the way in which it was done here was either dangerous or unusual. Haleman says the majority of the bearings fit, and those that do not, have hard-wood blocks put under them, and the blocks are fastened with telegraph wire, and he was not positive but that some were bolted on. The particular car complained of was blocked and wired. Cazely and Richmond say it was the custom to haul these broad-gauge cars on the narrow-gauge trucks, though most of the broad-gauge were Erie cars, of a somewhat different construction; and Morris says the car in

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question was put on a Hays truck, fitted for carrying standard-gauge cars on a narrow-gauge road, and that this particular kind of "Nypano" car was so hauled quite often. These are plaintiff's own witnesses, and none of them say the practice was dangerous. The nearest approach to such testimony is by Morris, who says he "had his doubts."

But, even if the practice had been shown to be dangerous, that would not show it to be negligent. Some employments are essentially hazardous, as said by our Brother GREEN, in *North. C. Ry. Co. v. Husson*, 101 Pa. 1, of coupling railway cars; and it by no means follows that an employer is liable "because a particular accident might have been prevented by some special device or precaution not in common use." All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement or nature of the mode of performance of any work, "reasonably safe" means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community.

In *Ship-building Works v. Nuttall*, 119 Pa. 149, our Brother WILLIAMS said: "The testimony shows that such an attachment is not in general use. . . . It is not enough that some persons regard it as a valuable safeguard. The test is, general

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use. Tried by this test, the saw of the defendant was such a one as the company had a right to use, because it is such as is commonly used by mill owners, and it was error to leave to the jury any question of negligence based on the failure to provide a spreader." See, also, *Payne v. Reese*, 100 Pa. 306; *Sykes v. Packer*, 99 Pa. 465; *Allison Mfg. Co. v. McCormick*, 118 Pa. 519; and *Lehigh Coal Co. v. Hayes*, 128 Pa. 294.

As already seen, the testimony of plaintiff's own witnesses showed the custom of the appellant company to perform this part of its work in the way complained of. The defendant's witnesses showed the custom of at least two other narrow-gauge roads to use the same way. There was no countervailing evidence on part of plaintiff, though, as was said in the closely analogous case of *North C. Ry. Co. v. Husson*, 101 Pa. 1, "it was certainly a part of the duty of the plaintiff to affirmatively establish that the loading of cars in the manner complained of was an unusual occurrence." In the absence of such evidence, the defendant's last point should have been affirmed, and a verdict directed for the defendant.

It is also entirely clear that defendant's third point should have been affirmed. The deceased had been a brakeman on this train for five or six months, during which this mode of carrying broad-gauge cars had been used; cars similar to the one on which the accident occurred had been frequently carried, and that very car at least once, about ten days before. He not only thus had ample opportunity to know the risks of such trains, but he had his attention specially called to the alleged source of the accident, by having worked, just before becoming a brakeman, on the hoist by which the car bodies were transferred to the trucks. It was a perfectly plain case of acceptance of an employment, with full knowledge of the risks.

Judgment reversed.

Statement of Facts.

ESTATE OF MARY CAWLEY, DECEASED.

136 628
162 523APPEAL BY H. B. CAWLEY, FROM THE ORPHANS' COURT OF
UNION COUNTY.

Argued May 12, 1890—Decided October 6, 1890.

[To be reported.]

1. Although a contract and a will are essentially unlike, they may be, and sometimes are combined so as to give a testamentary character to what purports to be a will, or to convert a will into an irrevocable agreement. Whether a given writing is a will or a contract, must be determined from the character of its contents, rather than from its title or formal words.
2. If two or more persons own property in common, there is no objection, on principle, to their joining in a testamentary disposition of it, and this might be called a joint will. Whether, after the death of one or more of the makers, the surviving maker may revoke such a will, as to his title or share of the property devised, not decided.
- (a) Brother and sister joined in executing a paper in the following form :
"I, B. C., should I be the first to die, and I, M. C., should I be the first to die, give, devise and bequeath, and to the survivor of either of us," all the estate of the decedent, for life, with remainder over. Throughout the paper, except in the clause appointing an executor, the operative words were in the singular number :
3. The instrument was not a contract, in form or effect ; nor, there being no joint property or joint devise, was it a joint will. It was properly a double will, and must be construed and treated as the separate will of each maker, as fully as though a separate copy had been executed by each. Wherefore, after the death of one, it was revocable by the other as to his own property.

Before STERRETT, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 94 July Term 1889, Sup. Ct. ; court below, number and term not given.

On March 5, 1888, John H. Cawley entered an appeal in the court below from a decree of the register of wills admitting to probate a certain paper dated March 16, 1886, as the will of Mary Cawley, deceased, and granting letters testamentary thereon to Horace B. Cawley, "and from the refusal of the said register, on petition filed and hearing had, to vacate, annul and set aside the admission of said alleged will to probate, and to re-

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voke the said letters testamentary." A citation having been awarded and answered, the parties to the appeal took the depositions of witnesses, to be read in evidence upon the hearing thereof.

From the testimony thus taken, and the record of the case, the following facts appeared :

In 1886, Benjamin and Mary Cawley, who were brother and sister, each of advanced age and unmarried, were living together. They had done so for many years. Benjamin was the owner of the house in which they resided, and had a small amount of money. Mary was the owner of \$3,000 worth of bank stock. The ownership of the furniture, etc., in the house, was not disclosed by the testimony. On March 16, 1886, they joined in executing the following paper, prepared by Mr. J. Merrill Linn :

"We, Benjamin Cawley and Mary Cawley, brother and sister, of the borough of Lewisburgh, in the county of Union, state of Pennsylvania, being of sound mind and disposing memory, and yet mindful of the uncertainty of life, do make and publish this our last will and testament, hereby revoking any will heretofore made by us, or either of us, and intending to dispose of the whole of our estate, both real and personal.

"First. Upon the death of either of us, the survivor shall pay all the debts of the decedent, so far as the estate of the decedent shall reach to do so, have the decedent properly buried, paying all the expenses of the same, including a tombstone to be placed at the grave.

"Second. I, Benjamin Cawley, should I be the first to die, and I, Mary Cawley, should I be the first to die, give, devise and bequeath, and to the survivor of either of us, all the rest and residue of the decedent's estate, both real and personal, to have and to hold and enjoy the same during the life of the survivor, without impeachment of waste, with leave to use the body of the estate for necessity.

"Third. At the death of the survivor the hereinafter named executor shall pay the debts, funeral expenses, including a tombstone at the grave, of the survivor, and after the payment of the expenses of administration, and to the executor is given power to sell both the real and personal estate, and for that purpose empowered to make all necessary deeds, conveyances and assignments, all the rest and residue of the estate remaining shall be disposed of as follows :

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"The said residue shall be divided into nine parts, three parts thereof I give and bequeath to John Cawley, two parts to Hepburn Cawley, and one part to Horace Cawley, one part to Mary Henson, intermarried with Edward Henson, one part to Ada Gilmore, intermarried with Charles Gilmore, and one part to Emma Harter, intermarried with William Harter, all children of John Cawley, deceased. . . . [The will here declared certain trusts as to some of the legacies in remainder, the language used being "I declare," "I direct," etc.]

"We hereby make, constitute and appoint Horace C. Cawley to be the executor of this last will and testament; and direct that letters testamentary be not taken out until the death of the survivor of either of us, but that the survivor shall have and possess and enjoy all the property of which the one dying first shall die seised and possessed of, without let or hinderance, except that it be that the provisions hereinbefore made are not carried out by the survivor, and in such case the executor may take out letters that the same may be fulfilled, but not to invalidate or change the terms of the within bequests and devises, and except it be necessary to establish the title of the survivor.

"In testimony whereof we have severally hereunto set the hand and seals of each of us the 16th day of March, one thousand eight hundred and eighty-six."

On August 12, 1887, Benjamin Cawley died, and on August 22d, the above paper was admitted to probate as his last will. At the time of his death he had on deposit in bank the sum of \$300; and, as his sister was in need of money for her maintenance and it became necessary to draw this money out of the bank, letters testamentary on his estate were taken out by Horace B. Cawley, who, it was conceded, was the executor named in the will, his name being given therein as Horace C. Cawley, by mistake of the scrivener. The executor drew the money out of the bank and expended it in the payment of Benjamin Cawley's debts and funeral expenses, and in the maintenance of Mary Cawley.

On January 29, 1888, Mary Cawley died, and on February 1, 1888, the register again admitted to probate the paper dated March 16, 1886, this time as the will of Mary Cawley, granting letters testamentary thereon, in her estate, to Horace B. Cawley. Later in the same day, there was presented to the

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register for probate a testamentary paper executed by Mary Cawley, bearing date September 5, 1887, revoking all prior wills by her at any time made, making a disposition of her estate different from that provided for in the paper of March 16, 1886, and appointing John H. Cawley as her executor. The register took the affidavits of the subscribing witnesses as to the execution of the instrument of September 5, 1887, but refused to admit it to probate as the will of Mary Cawley.

On February 18, 1888, John H. Cawley filed a petition with the register praying for a re-hearing as to the admission to probate of the joint paper of March 16, 1886, as the will of Mary Cawley; for the vacation and setting aside of the probate thereof, and for the revocation of the letters testamentary thereon issued. The register granted the first prayer of the petition, but after the re-hearing refused the other prayers thereof.

After argument, the court, **BUCHER, P. J.**, sustained the appeal in an opinion which, after reciting the facts, continued as follows:

The first question that we encounter is, can there be such a thing as a joint will? Williams on Executors and Jarman on Wills, resting their opinion on Lord **MANSFIELD**'s decision in *Earle of Darlington v. Pulteney*, 1 Cowp. 260, and *Hobson v. Blackburn*, 1 Adams' R. 227, lay it down that joint wills are not tolerated by law. But these have not been considered as decisive of the question, and on the authority of *Evans v. Smith*, 28 Ga. 98 (73 Am. Dec. 751); *In re Diez's Will*, 50 N. Y. 94; *Ex parte Day*, 1 Bradf. 476, *Schumaker v. Schmidt*, 44 Ala. 454 (4 Am. Rep. 139); *Betts v. Harper*, 39 Ohio St. 641 (48 Am. Rep. 479), it is now considered settled that a will executed jointly by two persons, which purports to dispose of the separate estate of the one who should die first to the survivor, is valid, operating as the separate will of each, the same as if two instruments have been made.

But a distinction has been sought to be made where parties join in the execution of a writing purporting to be a will, but each one simply undertakes to dispose of his own property, and those cases in which the parties to an instrument in the form of a will, jointly executed, treat the separate property of each

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as something in the nature of a joint fund from which they make dispositions. In upholding instruments of the former class as valid wills, the principal case, and *Evans v. Smith*, supra, seem to incline to the opinion that the result might be different, as to instruments of the latter class, and it is so decided in *Clayton v. Iverman*, 2 Dev. & B. 558, and *Walker v. Walker*, 14 Ohio St. 157 (82 Am. Dec. 474), and the writings were held not to be valid either as joint wills or as separate wills of the parties. But now, even in England, *In re Lovegrove*, 2 Sw. & Tr. 453, s. c. 8 Jur., N. S., 842, where two sisters executed a testamentary paper, to the effect that the survivor should have all that remained of the property at the death of the first decedent, and that at the death of the survivor, the property should be divided among certain relatives, it was admitted as the last will of the survivor. So, too, in *Betts v. Harper*, 39 Ohio St. 639 (48 Am. Rep. 437), there being no revocation, the will upon the death of both sisters was admitted to probate.

But here and now the question is, can either party to a joint will revoke both before and after the decease of either? Upon this point, it will be observed that the joint instrument is sustained as the separate will of each, and it follows logically, as revocation is incident to all wills, that either party may revoke: *Betts v. Harper*, supra. It is true, 1 Redfield on Wills, 181, citing *Lord Walpole v. Orford*, 3 Ves. 402; *Rivers v. Rivers*, 3 Des. 190-195 (4 Am. Dec. 609), seems to consider it settled that mutual wills duly executed are irrevocable in equity after the death of either party. But where two persons agreed to make mutual wills, it would seem that bad faith in the one, either not making his will, or in canceling it after it was made, will not prevent the probate of the will of the other party: *Bynum v. Bynum*, 11 Ired. (S. C.) 32. So, where two persons had verbally agreed to make mutual wills or bequests in each other's favor, in certain events, on a bill to compel the executors of one to perform the agreement which had been carried out on the part of the other by the execution of a will, it was held that the agreement was within the statute of frauds, as it might not be performed within a year: *Izard v. Middleton*, 1 Des. 116. So a writing, executed by two persons, purporting to be a will, whereby, in consideration of mutual friendship they mutually promised that, in the event of the death of either,

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the survivor should pay the expenses of the last sickness and burial and should enter into the possession of the estate of the other, was held not to be a compact, but a will and revocable by either: *Schumaker v. Schmidt*, 44 Ala. 454 (4 Am. Rep. 125).

Mr. Bigelow, in a note to 1 Jarman on Wills, says: It appears to be settled that a contract to execute an ordinary will (i. e. not a joint or mutual will), is based upon a good consideration, is binding on the death of the party so agreeing, and may be specifically enforced against his legal representatives: *Lord Walpole v. Lord Orford*, 3 Ves. 402; *Gould v. Mansfield*, 103 Mass. 408; *Bynum v. Bynum*, 11 Ired. 632; *Auding v. Davis*, 38 Miss. 547; *Izard v. Middleton*, 1 Des. 116; *Rivers v. Rivers*, 3 Des. 190 (4 Am. Dec. 609). Our own cases, notably, *Johnson v. McCue*, 34 Pa. 180; *Brinker v. Brinker*, 7 Pa. 53; *Logan v. McGinnis*, 12 Pa. 27; *Turner v. Scott*, 51 Pa. 126, determine that an express agreement, upon sufficient consideration, to dispose of property by will, or otherwise, may be enforced like any other contract or bargain, and equity and law will indemnify the disappointed party in damages; but it must be a contract to do the particular thing, and upon a sufficient consideration.

Now, in the present case, even if the estate of Mary is liable upon an enforceable contract, it does not follow that the joint will must stand as her true will, and the subsequent will offered for probate be rejected, but the contrary is true. We cannot take a short cut by refusing the probate of the second will, and say that the joint will shall stand as Mary's will, and thus dispose of the whole case. But there is no evidence dehors the joint will itself to establish a contractual relation between these parties, and the joint will per se does not point to any contract; and, regarding the joint will as the separate will of each, there was nothing to prevent Mary from revoking her first will as she has in fact done. The effect of this revocation by Mary, is not to impair Benjamin's will, and the legatees entitled to the residue after Mary's life-interest determines, take his estate all the same, as if Mary had never revoked her side of the will, and whatever she received more than Benjamin's will gives her, her estate must account to Benjamin's executors. But so far as Mary has disposed of her own property, it passes under her own will. Nothing remains save a suitable decree

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The court then entered a formal decree sustaining the appeal from the register's decision ;¹ adjudging the paper dated September 5, 1887, to be the last will of Mary Cawley,² and ordering the register to admit the same to probate ;³ vacating the probate of the joint will of March 16, 1886, as the will of Mary Cawley,⁴ such vacation in no wise to affect said instrument as the will of Benjamin Cawley ; and directing that the costs of the appeal be paid equally by the two estates of Benjamin and Mary Cawley. Thereupon, Horace B. Cawley took this appeal specifying that the court erred :

1-4. In making the orders contained in the final decree.¹ to 4

Mr. J. Merrill Linn and *Mr. S. H. Orwig*, for the appellant :

1. The case is without precedent in Pennsylvania. There are, elsewhere, however, numerous cases of joint wills, mutual wills, and compacts and agreements concerning the disposition of property and estates to take effect after the death of testators and bargainors. In *Dufour v. Pereira*, 1 Dick. 419, which has often been quoted and approved and never reversed, Lord CAMDEN sustained a will similar to the joint will now before this court, holding that it could not be revoked after the survivor of the testators had proved it and taken benefits under it as the will of the other testator. Every other reported decision, so far as it might seem to be against us, rests on facts and circumstances widely different from those of the case at bar. Mary Cawley certainly bound herself not to dispose of her thirty shares of bank stock otherwise than as they were disposed of in the joint will.

2. It appears to be settled that a contract to execute an ordinary will, if based upon a good consideration, is binding, upon the death of the promisor, and may be specifically enforced against his personal representatives : *Walpole v. Orford*, 3 Ves. 402 ; *Canton v. Canton*, L. R. 1 Ch. 137 ; *Gould v. Mansfield*, 103 Mass. 408 ; *Bynum v. Bynum*, 11 Ired. 662 ; *Auding v. Davis*, 38 Miss. 547 ; *Izard v. Middleton*, 1 Des. 116 ; *Rivers v. Rivers*, 3 Des. 190 (4 Am. Dec. 609). It would seem to follow from this, that such a contract might be enforced against the party himself in his lifetime, an attempted revocation of a will, made in pursuance of it, not being a ground merely for an action for breach of contract. Hence, there is here, in

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effect, a case of an irrevocable will, whether the agreement be carried out or not: Bigelow's Note in 1 Jarman on Wills, 18; and see *Lewis v. Scofield*, 26 Conn. 452 (68 Am. Dec. 407).

3. If the facts appearing on this record, within the four corners of the will and in the testimony taken, constitute a sufficient ground for specific performance in equity, or for the recovery of damages at law, as the court below concedes, then, to avoid circuitry of action, the Orphans' Court may declare the joint will irrevocable. A contract by which, for a consideration, a person binds himself to dispose of his property by will in a certain way, is not contrary to any rule of policy, and it may be specifically enforced: *Logan v. McGinnis*, 12 Pa. 27; *Taylor v. Mitchell*, 87 Pa. 518. There is no difference between promising to make a will in a certain form, and making such a will with a promise not to revoke it: *Dufour v. Pereira*, 1 Dick. 419. In the latter case, the promise not to revoke should be specifically enforced and the will sustained, the attempt to exercise the renounced power of making a subsequent will being a fraud on the rights of the promisee.

Mr. Charles S. Wolfe (with him *Mr. P. L. Hackenburg* and *Mr. Andrew A. Leiser*), for the appellee:

1. The whole fabric of the appellant's case rests upon the assumption that by the joint instrument Benjamin and Mary Cawley agreed, for a valuable consideration, not to invalidate or change the terms of the bequests and devises therein contained. If this assumption be unfounded, there is an end of his case. We contend in the first place, that the instrument was simply the will of the one who should die first, such being the effect of its language. But, if this be not so, then it was simply the separate will of each, and as such it was at any time revocable by either to the extent that it was his will: *Schumaker v. Schmidt*, 44 Ala. 454 (4 Am. Rep. 135); *Lewis v. Scofield*, 26 Conn. 452 (68 Am. Dec. 404); *Evans v. Smith*, 28 Ga. 98 (73 Am. Dec. 751); *Diez's Will*, 50 N. Y. 88; *Ex parte Day*, 1 Bradf. 476; *Betts v. Harper*, 39 Ohio St. 639 (48 Am. Rep. 477.)

2. There is no evidence in the first instrument, or aliunde, that there was a mutual agreement between the makers, that this and no other should be their will, and that neither should

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have the right to revoke it without the other's consent. No such agreement could have been implied, even if the devises and bequests had been joint in form, "we" instead of "I" being used therein: *Schumaker v. Schmidt*, *Lewis v. Scofield*, *Evans v. Smith* and *Betts v. Harper*, *supra*. We do not dispute the proposition that one may, for a valuable consideration, obligate himself not to revoke a will made by him, nor do we question the decisions cited in support thereof. *Dufour v. Pereira*, 1 Dick. 419, which is principally relied on by the appellant, is unsatisfactorily reported, but it seems from the report that there was such mutual agreement and contract in that case.

3. Even, however, when there is such a contract, it will not prevent a revocation, nor operate to control the action of a probate court. If the instrument is a will, it may be revoked; as revocability is of the essence of a will. If the testator has bound himself by contract not to revoke it, his estate is liable for the revocation in damages. If that is not an adequate remedy, the rights of the party contracted with may be enforced, as in other cases of inadequate remedy at law, by bill in equity. This seems to us to be the solution of the whole matter of joint wills, and the way out of the confusion into which the decisions on the subject have fallen. It is consistent with the whole current of authorities, and reconciles any seeming conflict in them.

OPINION, MR. JUSTICE WILLIAMS:

The question presented by this appeal is one that has not arisen in Pennsylvania until now. It is important to a correct understanding of the real ground of controversy, to bear in mind the peculiar characteristics of a contract, and those of a will. A contract is an agreement between parties for the doing or not doing of some particular thing. The undertaking of one party is made in consideration of something to be paid or done by or on behalf of the other party, so that the obligation to do, and the right to require performance, are reciprocal. A will, on the other hand, is simply a statement of the purpose or wish of the maker as it exists at the time. As often as his purpose or wish changes, he may change the expression of it. When and why a change shall be made, depends on himself alone. He is answerable to no one for his determination to

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make one rather than another disposition of his property. After he has written out his will, and executed it in accordance with the forms of the law, it does not bind him; but, so long as he lives, he may change his own purpose, with or without a reason, and his last purpose properly written out and executed is his "last will and testament," because death makes any further change impossible. The binding force of a contract comes from the *aggregatio mentium* of the parties. The binding force of a will comes from the fact that it is the last expressed purpose of the testator, in regard to the disposition of his property after his own death. While he lives, it is without force or value, but it begins to speak when he ceases to do so, and thereafter is heard in his stead.

Although these instruments are so unlike, they may be, and sometimes are combined so as to give a testamentary character to what purports to be a contract, or to convert a will into an irrevocable agreement. Whether any given writing is a will or a contract, must be determined by the character of its contents, rather than from its title, or any formal words with which it may begin or conclude. The familiar form of a will is that by which the testator directs how his property shall be disposed of after his death, and may be distinguished or described as the simple will of the maker. If two or more persons own property in common, they may convey it by joining in a deed, or by executing separate conveyances, at their convenience. They may transmit the title, each for himself, by a separate will; and there is no objection, on principle, to their joining in a testamentary disposition of it. Such a will might be properly called a joint will, because executed jointly by several owners, as a means of transferring their several titles to one devisee. The validity of a joint will was at one time denied in England, and has been denied in some of the United States, but the reasons for such denial relate rather to questions of probate than to the power of the several testators, and do not seem to have been regarded as settling the question in the countries where the decisions were rendered: 1 Williams on Executors, 10. Whether, after the death of one or more of the makers of such a will, the surviving maker may make a valid revocation as to his own title or share of the property devised, is an unsettled question and is not involved in the

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case before us, for the property to which this will relates was not held in common by the testators.

.Another class of questions is presented, when two or more persons make reciprocal testamentary provisions in favor of each other, whether they unite in one will, or each executes a separate one. Such wills may be described as mutual or reciprocal. Their validity does not seem to be doubted, after the death of the respective testators; but the extent of the power of revocation in the survivor, after the death of one or more of the testators, is a question still in controversy and upon which different conclusions have been reached. In *Evans v. Smith*, 28 Ga. 98, the will was signed by two, and presented by the survivor for probate. No revocation was attempted, and the only question really before the court was the validity of the paper as the will of the deceased signer. The court held it valid, characterizing it as a "double will." In *Lewis v. Scofield*, 26 Conn. 452, a similar will was presented, and its validity upheld by the court. In *Betts v. Harper*, 39 Ohio St. 639, the testators were tenants in common. After the death of both, it was probated as the separate will of each, and the earlier case of *Walker v. Walker*, 14 Ohio St. 157, which had denied the validity of such a will, was distinguished and qualified. The will of a husband and wife making reciprocal provisions for each other, and executed by both, was sustained in *Diez's Will*, 50 N. Y. 88. In *Schumaker v. Schmidt*, 44 Ala. 454, two persons, who described themselves as "friends of many years standing," joined in a will by which the survivor was to take the property of the one dying first. Auerbach, one of the joint makers, made a later will, with a different disposition of his property, and died. The survivor insisted on the irrevocability of the first will, and claimed the estate, but the court upheld the last one. The point in controversy was stated in the opening sentence of the opinion of the court as follows: "Was the writing between Schumaker and Auerbach a compact, and not a will, or a will containing a compact, and therefore irrevocable?" The conclusion of the court was that the writing was not a compact, but a will, and therefore revocable at pleasure. It is worthy of note that the only consideration expressed for the mutual provisions made by the first will, was the "mutual esteem" which each entertained for the other.

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This might change in degree, or cease altogether, at any time. While it existed, it explained the mutual or reciprocal provisions contained in the will. It afforded not a consideration, but a reason, for them.

The will now before us was executed by a brother and sister. They were single, had lived many years together, and were feeling the infirmities of age. One owned a house and lot worth about \$3,000. The other owned bank stock of about the same value. Their household goods seem not to have been the exclusive property of either. They appear to have lived together in the house, and used the income from the bank-stock, without keeping an account with each other. By their will, they provided that the survivor should have the property of the one first to die, during life, and that it should then go over to remainder-men named. The learned gentleman by whom it was drawn seems to have had *Walker v. Walker*, 14 Ohio St. 157, in his mind, and to have drawn the paper with the purpose of steering clear of the difficulty suggested by it. To this end the will is made to speak for each devisor separately, thus: "I, Benjamin Cawley, should I be the first to die, and I, Mary Cawley, should I be the first to die, give, devise, and bequeath, and to the survivor of either of us, all the rest and residue of the decedent's estate, both real and personal, to have and to hold and enjoy the same during the life of the survivor, without impeachment for waste, and with leave to use the body of the estate for necessity." After the payment of debts and expenses, and the expiration of the life-estate, the will directs that the residue be divided into nine parts, and then proceeds: "Three of which parts I give and bequeath to John Cawley, two parts to Hepburn Cawley, one part to Horace Cawley, one part to Mary Henson, . . . one part to Ada Gilmore, . . . and one part to Emma Harter." H. C. Cawley was made a trustee for Ada, and her share was devised to him thus: "I give and bequeath to H. C. Cawley, in trust, etc.; and the will then defines the nature of the trust, and uses the words, "I distinctly declare that the above trust is an active one."

The singular number is invariably used throughout the will, each testator speaking for himself or herself only, and neither attempting to speak for the other or of the other's property. Each seems to have desired to make the same disposition of

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what he or she owned. Both adopted the same written expression of that desire, and executed it. The will so made must be regarded, therefore, as the separate will of each testator, as fully as though the will of each had been separately drawn up and signed. There was no joint property or joint devise. It is not, therefore, a joint will. It is not a contract between the makers in form or in effect. No consideration passed from one to the other, and none is suggested, except the affectionate interest which this aged brother and sister felt for each other. This moved them to provide for each other's comfort by a life-estate in the survivor, but beyond that each gave to the remainder-men only what each owned. Such a will is properly described by the phrase in *Evans v. Smith*, *supra*, as a double will. It must be construed and treated as the separate will of each testator who signed it, in the same manner as though a separate copy had been executed by each. It was therefore revocable by both. Benjamin Cawley did not revoke, and his will is to be executed in accordance with its terms. Mary Cawley has exercised the power of revocation, and changed the ultimate destination of her property. Her last will must be followed, therefore, in the distribution of her estate.

The decree of the court below is affirmed, at the cost of the appellant.

136	640
142	563
136	640
143	104
136	640
161	828

G. N. HORN v. S. MILLER ET AL.

APPEAL BY PLAINTIFF FROM THE COURT OF COMMON PLEAS
OF BEDFORD COUNTY.

Argued May 12, 1890—Decided October 6, 1890.

[To be reported.]

(a) Cade and Miller, owning respectively adjoining lands on a stream, made an agreement, in settlement of an action by Cade against Miller for diverting water from one channel to the other, which provided that Cade, his heirs and assigns, should enjoy a "water right or power" for two wheels on any part of his land, and Miller, his heirs and assigns, should enjoy water for his mill only when there was a surplus:

1. The superior right, recognized in the agreement as being in Cade, was

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a right as a riparian owner ; therefore, as the covenants in the agreement related to the lands of the respective parties, and were to be performed thereon and in connection with the use and enjoyment thereof, they ran with the land and regulated the mutual rights of the heirs and assigns of the parties, respectively.

2. While privity of estate is ordinarily necessary to a covenant running with the land to which it relates, justice will require that the right to enjoy such contracts should extend to all who have a beneficial interest in their fulfilment ; and, when the benefit and the burden of covenants securing mutual rights are so inseparably connected that each is necessary to the existence of the other, both must go together.
3. When the land of one of the parties to such an agreement as the above has been conveyed by him, it is of no consequence that the deed may make no mention of the agreement or of the rights accruing therefrom ; the right of such party as a riparian owner, recognized and defined by the agreement, will pass as appurtenant to the land, and it is unnecessary to mention it in the deed.
4. The assignee of a part only of such land, who is the owner of the only mill-seat on the original tract, may sue for a diversion of water made by the successor of the party who covenanted with his assignor ; that mills may be built on other parts of the land, which will use the water after it leaves his mill, cannot affect the servient tenement, or, if it would, the apprehension thereof will not justify such diversion.
5. When landowners have entered into covenants, defining and securing their respective rights in the use of the water of a stream, their agreement is equivalent to a grant ; and, as in other cases of grants of easements, the proper remedy of one party for a disturbance of his right by the other party, or those claiming under him, is by action of trespass and not by action of covenant.

Before STERRETT, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

No. 152 July Term 1889, Sup. Ct. ; court below, No. 395 September Term 1887, C. P.

On September 12, 1887, G. Newton Horn brought trespass against Samuel Miller and others, for an alleged wrongful diversion of water from the plaintiff's mill. The defendants pleaded not guilty, and afterwards added a plea averring adverse user.

At the trial on November 29, 1888, the following facts were shown :

The plaintiff was the owner of a tract of land containing 9 acres and 120 perches, near the town of Hyndman, on which was a grist-mill, run by water power obtained from Wills creek.

Statement of Facts.

About a mile above the mill, that creek divided into two channels, whether naturally or artificially did not clearly appear. One of those channels passed through the plaintiff's land, and supplied the water for his mill; the other passed through a tract owned by the defendant, Samuel Miller, and from it the latter obtained water power for a saw-mill.

The plaintiff's land was a part of a tract of thirty-two acres which in 1852 was owned by Enoch Cade, who was then the owner also of other land adjoining. An old saw-mill, dilapidated and out of use, stood at or near the site afterwards occupied by the plaintiff's mill. The defendant's lands, at that time, and his lands farther up the stream, upon which it separated into two channels, were owned by John Miller. In the year stated, Cade brought an action against John Miller in the Court of Common Pleas of Bedford county, to recover damages for a diversion of the water of Wills creek. This action was settled by the following compromise agreement, executed by Miller and wife and Cade, with an acknowledgment before a justice of the peace, and recorded on the day after its date:

"Whereas an action on the case, in the Court of Common Pleas of Bedford county, has been instituted to No. 14 of February Term 1852, and is now pending, by and between Enoch Cade and John Miller, both of Londonderry township in said county, regarding the diverting of the waters of Wills creek from their natural channel over and upon the land of said Cade, viz., part of tract warranted in the name of Peter Smith being thirty-two acres and sixty-one perches, situated in said township. . . . Now, therefore, for the purpose of settling all dispute regarding the same: Know all men by these presents that we, the said Miller and Catharine, his wife, and the said Cade, do covenant, agree and bind ourselves as follows: The said Cade, his heirs, executors, administrators or grantees, are to use and enjoy a water right or power for two wheels of any capacity and size he or they may see proper to erect on the land owned by him as above described, or the piece he has lately bought from Michael Carpenter and wife, adjoining the other to the east, without let, hindrance or diversion by channels now existing or by new channels on any land owned by said Miller, or by any hindrance or diversion whatever by the said Miller, his heirs, executors, administrators or grantees.

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In order to enjoy which, said Cade is not to allow any unnecessary waste of water. Further, at all times when there is a surplus of water in said creek, over and above what may be needed for the full, free and uninterrupted enjoyment of the said two wheels of the said Cade, in manner aforesaid, then the said Miller is to have, use and enjoy water sufficient for the full and free use of the saw-mill now owned by him about sixty or seventy yards southwesterly from the said bridge, or of anything else he may put there not requiring, using or diverting more water than would be necessary for the enjoying the said saw-mill as it now exists. In order to enjoy which, said Miller is not to allow any unnecessary waste of water. The rest of the said water of said creek, over and above the said water said Miller is to use in manner aforesaid, is to be used and enjoyed in any manner deemed proper by said Cade. Said Miller is to have a flood-gate erected at the mouth of his head-race, and shut the same down tightly and securely when the said creek does not furnish more than enough for the said two wheels of the said Cade as aforesaid, and also at all times else when he is not using his own mill, and at all times, is not to interfere in any way with said two wheels as aforesaid, or the rest of said water over and above his own belonging to the said Cade as aforesaid. And for the true performance of all these agreements and covenants, we mutually bind ourselves, our heirs, executors, administrators and grantees by these presents. Witness our hands and seals this eighth day of July, A. D. 1852."

By deed dated April 9, 1864, Cade conveyed the two tracts mentioned in the foregoing agreement to James C. Devore. The deed made no reference to that agreement, or to the rights thereby granted, but contained the usual clause mentioning "ways, waters, water-courses," etc., among the appurtenances of the land conveyed. On November 21, 1868, Devore conveyed the same lands to Edward Manley and Daniel O'Donnell, describing them together, by metes and bounds, as one body containing forty-four acres and five perches. In the deed to Manley and O'Donnell the words "waters, water-courses" were omitted, and there was no reference of any kind to water rights. That part of the thirty-two acres, mentioned above as owned by the plaintiff, was conveyed to him and one Cook by

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deed from Manley and the heirs of O'Donnell, by a deed dated April 16, 1881, which made no mention of any agreement or rights respecting waters. By subsequent conveyances, the plaintiff became the sole owner of said nine acres.

Cade never erected a mill on his land after the agreement of July 8, 1852, and none was erected until about 1880 or 1881, after the plaintiff and Cook had contracted for the purchase of their land, when the grist-mill above mentioned was constructed, with one turbine wheel.

The testimony tended to show that the defendant had caused the diversion, from the channel through the plaintiff's land and into the channel passing through his own land, of a larger quantity of water than was permitted by the agreement of 1852, and that, in consequence of such diversion, there was not a sufficient flow of water in the former channel to keep the plaintiff's mill running with one wheel. Testimony was given on both sides of the case respecting a claim by the defendant of twenty-one years' adverse user of the water, in the manner complained of, and an allegation by the plaintiff that the defendant Miller had done acts and made declarations estopping him from disputing the plaintiff's title to the rights granted by John Miller to Enoch Cade.

At the close of the testimony, the court, BAER, P. J., charged the jury submitting to them the questions of fact raised by the testimony, and reserving for consideration and ruling "after the verdict, on proper motion filed, on the facts appearing on the face of the deeds and the agreement of July 8, 1852," four points presented by the defendants, as follows :

3. The agreement of July 8, 1852, is merely an executory agreement, with mutual covenants ; and, by its terms, Cade was bound to use the water by the erection of a mill, and not having done so, no mill having been ever erected or flood-gates put in, the contract failed and is inoperative and gives no rights to the plaintiff in this suit.

4. There being no express mention of the covenant, agreement or contract, or transfer of Cade's rights under it, if he had any, to J. C. Devore, O'Donnell and Manley and Horn, in the deeds of conveyance, the plaintiff would have no right or title to the water under said agreement.

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5. The conveyance of Manley and O'Donnell to Horn does not mention water, water-courses, ways or anything except appurtenances, and under that word no right could pass to the plaintiff, by virtue of that agreement, to water not held and used as an appurtenance at the time of the conveyance of the land.

6. The conveyance of Manley and O'Donnell to Horn for nine acres of the land to which it is claimed the agreement of 1852 is appurtenant, to wit, thirty-two acres, would not operate as a conveyance of the water right to the plaintiff, the same being appurtenant, if at all, to the whole. The privilege was an entire thing and cannot be divided. A conveyance of parts of the land in parts, is an increase of the burden of the easement and destroys it, it not having been made to appear that there is but one mill-seat on the land.

The jury rendered a verdict in favor of the plaintiff for \$52. Motions for a new trial, and for judgment for the defendant non obstante veredicto, having been argued, the court, BAER, P. J., filed an opinion which, after reciting the facts, proceeded as follows :

In none of the deeds is there more than a mere description and conveyance of land by metes and bounds with the appurtenances. There has been no conveyance of the premises as a mill or mill-seat, and there is no evidence to show that the easement claimed was or is necessary to the reasonable enjoyment of what was expressly granted. The easement is not a part of the granted premises, and there is no evidence to show that at the time of the grant the easement was apparent, visible, or seemed to be necessary to the complete enjoyment of the premises.

Parties are presumed to contract with reference to the condition of the property as it exists at the time of the contract or conveyance, unless by the contract made to otherwise appear. Whatever belongs to the thing granted as parcel thereof will pass with a grant of the land, and is included under the name appurtenances. Whether a certain right or easement is appurtenant, depends upon the condition of the land at the time of the conveyance, and how far the right is necessary to the enjoyment of the property as granted. If the easement was enjoyed,

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at the time of conveyance, in connection with the land granted, it will pass to the grantee. In this case, it clearly appears it was not so enjoyed at the time of contract and conveyance, and it is not necessary to the complete enjoyment of the land as described and expressly granted.

In our view of the law on the question reserved, the easement did not pass to the grantee by virtue of said deeds, and, therefore, the plaintiff had no cause of action; wherefore, the motion for a new trial is now overruled and judgment is now ordered to be entered for the defendants, upon paying the jury fee, notwithstanding the verdict.

A re-argument upon the motion for judgment having been heard, the court, BAER, P. J., filed a second opinion, as follows:

The able argument of counsel for plaintiff leads me to consider whether I may not have totally misapprehended the case; if their views are correct, I did to some extent misapprehend.

I ruled the question as involving the existence of an easement, etc. They argue, first, there was no easement; second, the case is theirs, on the general principle that the conveyance or grant carried the stream with the land, etc. They do not seem to dispute the legal principles stated, but say the conclusion does not follow because that other principles are involved.

The principles of law stated in the former ruling need not be re-stated. An easement is defined to be a privilege "without profit, which the owner of one neighboring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer, or not to do something on his own land, for the advantage of the dominant owner:" 10 Am. & E. Encyc. of Law, 139. This definition embraces an affirmative and a negative easement. A negative easement is where the owner of the servient tenement is prohibited from doing something upon his own land which he otherwise might do. An affirmative easement is where the owner of the servient tenement must permit some act to be done thereon by the owner of the dominant estate. In the case at bar, the easement or privilege, if anything, is a negative easement. It is a servitude nevertheless, binding upon the land of the defendant, and is an interest therein in favor of Enoch Cade and any person holding under him by grant.

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The owner of this servient tenement can be compelled to use it in a particular way, so as to take no more water from the stream, at the point of divergence, than was provided for by the contract made between Enoch Cade and John Miller. Such an easement could only pass by grant: Washburn on Easements, 19, 605, 623, 626. If such an easement becomes appurtenant to an estate, it follows it and every part of it, into whosoever hands it may come, provided the burden is not increased.

The contract between Cade and Miller covered a tract of thirty-two acres and a contiguous parcel, of which nine acres only came by grant in the hands of the plaintiff. "Where a specific parcel of land is cut out of a larger one held by a grantee, and it is described by metes and bounds, in such a case nothing passes as parcel of the granted premises which was matter of ease and convenience only, except what is included within the bounds expressed in the deed:" Washburn on Easements, 36. The easement originally created by grant was not extinguished by grant, nor, as the jury found, by adverse user. It therefore still exists, for the benefit of any one who can lay claim to it under a grant.

If the estate to which the easement was appurtenant was so conveyed as not to carry the easement with it, then it is immaterial in this case what became of it. For, unless it passed to the plaintiff by virtue of the grant to him of nine acres as part of the Cade tract, with metes and bounds described with no reference to the easement, which was not apparent or in use in connection with the premises granted or with the whole, of which it was a part, he can have no standing to raise any question about it.

It is claimed by the plaintiff that whether it passed to him by the grant or did not pass, is only a question between him and his vendors, and not one in which the defendant has any interest; for, as the jury decided the question of adverse user against the defendant, the easement continued in favor of Enoch Cade and those holding under him. There is force in this position. But, under the contract, nothing else appearing, the defendants, and those under whom they claim, could use the stream as it was being used at the date of the Cade-Miller contract, against all the world except Enoch Cade and those holding under him

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by grant of the easement. Levi Rizer is the present holder under Enoch Cade of the greater part of the Cade tract, covering the same stream lower down. If he also, on a like general grant, or one conveying the easement, could invoke the provisions of the Cade-Miller contract and claim a two-wheel power, it is manifest from the location of the party that the burden would be increased.

In the light of the principles of law referred to and cited in our former ruling and those additionally relied on in this opinion, we are constrained to adhere to the former conclusion, that the easement did not pass by the grant, however defective the reasoning then and now may be.

This brings us to a consideration of a further question raised in re-argument. The plaintiff further argues that the right to the stream passed with the land by the deed, and that the question of easement is not involved. It is undoubtedly true that the natural stream running through the plaintiff's land is an incident annexed by law itself to the land; it is a part of the freehold, and it passed with the grant as land. He is entitled to the use of the water flowing in the stream and over his land, in its natural current, without diminution or obstruction, and no upper proprietor has a right to diminish the quantity, which will, according to the natural current flow to a proprietor below.

The stream severed above the land of Enoch Cade. Whether the division or severance was natural or artificial, or whether, below the point of severance, the Cade or the Miller branch of the stream was the original natural current of the stream, is not clear and is not found by the jury. But from the evidence, and the face of the contract between Enoch Cade and John Miller, it is apparent that the flow over Cade's land was not, at the time the contract between Cade and Miller was made, at all seasons sufficient to run two wheels; for the contract provides that a gate should be erected at the point of diversion, on the Miller branch, and should, during low stages of water, be closed so as to prevent the full flow of the Miller branch of the stream; thus showing that the flow in the Cade stream, at the date of the contract, was not sufficient to run two wheels. The easement was created to give him enough.

The flow of the stream, on the evidence, was at the time of

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trial as it was at the date of the contract, and by his grant the plaintiff has now the use of the stream as the flow then was; and, without a grant of easement, he is entitled to no more, in the absence of proof to satisfactorily show that the natural flow was at any time greater.

I am satisfied on due consideration with the former conclusion, though the reasoning then and now may be defective. •

The third and fourth points reserved are now negatived; and, on the fifth and sixth points reserved, we overrule the motion for a new trial and direct judgment as entered for the defendant, non obstante veredicto, in January, 1890, to stand.

Thereupon the plaintiff took this appeal assigning for error:

1. The reservation of the defendants' points.
2. The entry of judgment for the defendants.
- 4, 5. The affirmance of the defendants' fifth and sixth points.

Mr. John M. Reynolds (with him *Mr. E. F. Kerr* and *Mr. R. C. McNamara*), for the appellant:

1. The court misconceived what was essential to constitute a valid reservation; or, if the reserved question were properly stated, overlooked the bounds within which a decision of the cause should have been made. As the third and fourth points of the defendants were finally negatived, it will be necessary for us to consider only the fifth and sixth. An affirmance of these points, as correct statements of the law, did not involve or justify the entry of judgment for the defendants. To enter that judgment, required the assumption of other facts than those appearing in the reservation, which we have a right to presume are negatived by the verdict. The court was not justified when passing on these points, in assuming that at the time of the conveyance by Manley and O'Donnell's heirs, the water in question was not held and used as an appurtenance to the land, or that the flow of water through the plaintiff's land was an appurtenance or easement only, and not a part of the land itself.

2. Not only the point of law reserved, but the facts on which it arises, must be distinctly stated in the reservation: *Fayette City v. Huggins*, 112 Pa. 1; *Patton v. Railway Co.*, 96 Pa. 169; *Inquirer Printing Co. v. Rice*, 106 Pa. 623; *Buckley v. Duff*,

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111 Pa. 223. The reservation must not be of a mixed question of law and fact: *Commonwealth v. McDowell*, 86 Pa. 377; *Winchester v. Bennett*, 54 Pa. 510; and, in passing on it, the testimony cannot be considered, and conclusions drawn therefrom: *Central Bank v. Earley*, 113 Pa. 477; *Henry v. Heilman*, 114 Pa. 499. A point of law cannot be reserved properly, unless, if held in one way, the court would be bound to give binding instructions to the jury: *Wilde v. Trainor*, 59 Pa. 439. But, if the reservation was in such form as to authorize judgment, the conclusions reached were not proper. They rested on unauthorized assumptions made by the court. Even assuming that the right to the water, under the agreement of 1852, was a mere easement, the rulings of the court were erroneous.

3. An easement created by grant and annexed to land, will not be lost by mere disuse, an adverse use being necessary to destroy it: *Erb v. Brown*, 69 Pa. 216; *Washburn on Easements*, 3d ed., 670; 6 Am. & E. Encyc. of Law, 148; *Lindeman v. Lindsey*, 69 Pa. 93; *Bombaugh v. Miller*, 82 Pa. 203; *Demuth v. Amweg*, 90 Pa. 181; and, on a conveyance of the land, it will pass by or even without the word appurtenances: *Washburn on Easements*, 35. But this was not a mere easement. The right to the flow of water in its natural course is parcel of the inheritance: *Angell on Water-courses*, 6th ed., 96; *Wheatley v. Baugh*, 25 Pa. 528; *Wheatley v. Chrisman*, 24 Pa. 298; *McCoy v. Danley*, 20 Pa. 85. An easement is not destroyed by the mere subdivision of the dominant land: *Hills v. Miller*, 3 Paige 254 (24 Am. Dec. 218); *Story v. Railroad Co.*, 90 N. Y. 122 (43 Am. Rep. 146); *Dawson v. Insurance Co.*, 15 Minn. 136 (2 Am. Rep. 113); *Watson v. Bioren*, 1 S. & R. 227; *Private Road*, 1 Ashm 417; 6 Am. & E. Encyc. of Law, 152; *Outerbridge v. Phelps*, 13 Abb. N. C. 117; *Kirkham v. Sharp*, 1 Wh. 323; *Lewis v. Carstairs*, 6 Wh. 193; *Evans v. Dana*, 7 R. I. 306. That such division would increase the burden, in this case, does not appear.

Mr. W. M. Hall, Jr., (with him *Mr. W. M. Hall*), for the appellees:

1. The facts, upon which the reserved points were based, were found in the deeds and agreement under which the plaintiff claimed, and were undisputed. The court held that

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the effect of the agreement of 1852 was the grant of an easement to Cade. It was incumbent on the plaintiff to show that this easement was apparent at the time when the deed of Manley and O'Donnell's heirs was made, and that it was necessary to the land granted by that deed. This he did not do.

• There were two branches of the case: (a) The question of adverse user, on which there was a verdict for the plaintiff; and (b) the question whether the plaintiff had any cause of action under the agreement of 1852 and his title deeds. The latter was a pure question of law. The court could not have given binding instructions on it, as the former question was one of fact, upon which there might readily have been a verdict for either party.

2. The language of the agreement of July 8, 1852, amounts to a covenant, simply, mutual, dependent, executory, with no performance by either party. Such a covenant does not run with the land: *Hurd v. Curtis*, 19 Pick. 459; *Morse v. Aldrich*, 19 Pick. 449; 2 *Washburn on Real Prop.*, 13; *Van Rensselaer v. Bonesteel*, 24 Barb. 365; *Plymouth v. Crum*, 19 Pick. 183; *Bronson v. Coffin*, 108 Mass. 175. While the benefit of a covenant running with land will pass with the land to which it is incident, the burden will adhere exclusively to the original covenantor, unless the relation of privity of estate or tenure subsists, or is created, between the covenantor and covenantee when the covenant is made: *Blount v. Harvey*, 6 Jones (N. C. L.) 186; *Spencer's Case*, 1 Sm. L. C. 161; *Lau v. Mumma*, 43 Pa. 267. Moreover, we maintain that it was incumbent on Cade, or his successors, to erect the wheels referred to in the agreement, within a reasonable time, and as they did not do so, the agreement became dead.

3. If the agreement did create an easement in favor of Cade's estate, such easement did not pass to the plaintiff. In the division of an estate only such easements pass by implication, without express terms, as are continuous, apparent, and necessary for the enjoyment of the parcel granted: *McCarty v. Kitchenman*, 47 Pa. 243; *Griffiths v. Morrison*, 106 N. Y. 165; *Reniers v. Young*, 38 Hun 335; *Root v. Wadhams*, 107 N. Y. 384. It is not to be presumed that O'Donnell's heirs and Manley, in granting nine acres, intended to grant an exclusive right to this easement, to the detriment and burden of

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the remainder of their land, especially as they used no words of conveyance of water, water-rights or water-courses: Washburn on Easements, 49; Grant v. Chase, 17 Mass. 443; Parson v. Johnson, 68 N. Y. 62 (23 Am. Rep. 149); Palson v. Ingram, 22 S. C. 541; Maynard v. Esher, 17 Pa. 222. If the owners of the other Cade lands may erect a two-wheel power, the burden would be increased and this destroys the easement: Washburn on Easements, 32; Caldwell v. Fulton, 31 Pa. 475. Should this court reverse, no judgment can be entered for the plaintiff, as we have taken exceptions to the rulings of the court below: Patton v. Railway Co., 96 Pa. 169.

OPINION, MR. JUSTICE CLARK :

This action was brought to recover damages for the diversion of the water of Wills creek, from the channel through which the plaintiff supplied the wheel of his grist-mill, near Hyndman, in Bedford county. It appears that the waters of Wills creek divide at a point about a mile above the plaintiff's land, (whether from artificial or natural causes does not appear,) and thence proceed in two channels, one by the plaintiff's mill, and one by the defendants' mill, to a point a short distance below both mills, where a junction is again effected. It also appears that, in the year 1852, John Miller owned the land now owned by the defendants, and also the land adjoining, upon which the stream divides, now owned by Jacob Evans, and that Enoch Cade was the owner of some forty-two acres in two adjoining parcels, one containing thirty-two acres, more or less, part of the New Bridgeport tract; the other containing about nine acres, known as the Carpenter lot.

The appellant's contention is, that the extent of his right is fixed by an agreement dated July 8, 1852, between John Miller and Enoch Cade, who were thus the predecessors in title to the respective premises involved in this controversy. In the year 1852, an action was pending in the Court of Common Pleas of Bedford county, in which Enoch Cade was plaintiff and John Miller defendant. The action was brought to recover damages for the diversion by Miller of the waters of Wills creek to his saw-mill, on one channel of the stream, to the prejudice of the right of Cade, who was the owner of a mill-site, on the other channel. The matters in controversy in this suit were settled according to the terms of the agreement mentioned.

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By this agreement it is provided, in substance, as follows: Cade, "his heirs, executors, administrators or grantees," were conceded the right to use and enjoy the "water right or power" for two wheels, of any capacity and size he or they might see proper to construct, on either of the lots mentioned as belonging to him, "without let, hindrance, or diversion by said Miller, his heirs, executors, administrators or grantees." When there was any surplus water, "over and above what may be needed for the full, free, and uninterrupted enjoyment of the two wheels," Miller was to have thereof what was sufficient for the full and free use of his saw-mill, "not requiring, using, or diverting more" than was necessary for that purpose; the rest of the water of said creek, and there was to be no unnecessary waste of the water by either party, was to be used and enjoyed by Cade. The concluding clause of the contract is as follows: "Said Miller is to have a flood-gate erected at the mouth of his head-race, and shut the same down tightly and securely when the said creek does not furnish more than enough for the said two wheels of said Cade, as aforesaid, and also at all times else when he is not using his own mill, and at all times is not to interfere in any way with said two wheels, as aforesaid, or the rest of said water, over and above his own, belonging to said Cade as aforesaid."

There is no dispute as to the proper construction of this agreement; there is no ambiguity of expression, or uncertainty of meaning alleged, but the legal effect of it is what is most in dispute. It is certainly clear that the suit pending in 1852 was for redress of injuries for an invasion of Cade's right as a riparian owner. The agreement was made in adjustment of Cade's right as such. Miller had no right, by artificial means, to withdraw the water from Cade's use. He was restricted in his use and enjoyment of the water to the natural flow, and the foundation of the action was that the natural condition of the stream had been interfered with. The agreement was, virtually, a recognition of the superior claim of Cade; for his right was distinctly recognized and entitled to a preference, and was intended to be protected under the terms of the agreement. But the right which was thus protected was, nevertheless, his right as a riparian owner, the extent of which, in view of all the facts and circumstances, was declared and established

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between the parties, their heirs, executors, administrators and assigns, in the terms of the contract.

The right to reasonable use of water in its natural flow, without any diversion of it from its ordinary channel by artificial means, is incidental to the ownership of the land through which it flows, and the extent to which it may be used and applied affects the use and consequent value of the land itself. These covenants, therefore, relate to the land of the respective parties, or to the enjoyment of the land which they had in possession in fee, and were to be performed upon and in connection with its use and enjoyment. The present parties litigant have, in part at least, the same lands respectively to which the agreement relates, also in fee. The covenants were by the covenantors for the mutual benefit of themselves, their heirs, executors, administrators or grantees, and the present owners, holding the land by conveyance from the covenantors respectively, under the law of this state are in privity of estate with them respectively. There was no privity of estate between the contracting parties, but the covenants, being in adjustment of their respective rights to the use of the water of Wills creek, must be construed as a mutual benefit to, and not as a burden upon, the lands of either.

We are of opinion, therefore, that the covenants in question run with the land, and define the rights, not only of the parties thereto, but of their respective heirs and assigns. To the general rule that between the covenantor and covenantee there must be such privity of estate as would formerly have given rise to the rule of tenure, there are in this state, and perhaps in some of the other states, well-recognized exceptions. Covenants capable of running with an assignment of a present estate in land may, it seems, have that capacity in certain cases, although no estate passes between the covenantor and covenantee at the time of covenant made. The obligation of contracts is, in general, limited to the parties making them: where privity of contract is dispensed with, there must ordinarily be privity of estate; but justice sometimes even requires that the right to enjoy such contracts should extend to all who have a beneficial interest in their fulfilment, not to impose a burden upon an ignorant and innocent third person, but to enable purchasers of land to avail themselves of the benefit to which

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they are in justice entitled. The character of a covenant of this kind must depend upon the effect of the entire agreement of which it is a part, and, where the benefit and the burden are so inseparably connected that each is necessary to the existence of the other, both must go together; the liability to the burden will be a necessary incident to the right to the benefit: See note to *Spencer's Case*, 1 Sm. L. C. 174. It was upon this ground that, in *Coleman v. Coleman*, 19 Pa. 100, a covenant entered into by the owners of the estate that a part only should be divided, and a part "remain together and undivided as a tenancy in common," was held to run with the land, and to bind not only the contracting parties, but their heirs and assigns, although not named in the contract, and therefore to constitute a bar to an action of partition upon the part undivided instituted by the heirs at law of one of the parties. Although there was not, in any proper sense, as to the undivided mine hills, a privity of estate between the tenants in common, yet, as the covenant pertained to and was attached to the realty, providing for the manner of its future enjoyment, it was styled a real covenant; and, being for the mutual benefit and advantage of all, it was held to run with the land.

In *Carr v. Lowry*, 27 Pa. 257, there was a grant of a mere easement, the right to cut and keep up a tail-race through Carr's land for the benefit of the adjoining lands of Lowry, to which was annexed a covenant of Lowry, his heirs and assigns, to keep the race timbered, planked, and covered with earth, and to be held for damages, etc. The burden imposed was necessarily incident to the enjoyment of the benefit, and it was held that the contract defined the duties which ought to be performed by whoever should be the owner of the mill for the benefit of which the easement was created. "We cannot presume," says Mr. Justice LOWRIE, "that he (Lowry) intended to bind his personal representatives to such duties. In the natural order of affairs, they accompany the ownership of the property to which they relate, and therefore in the present case ought to be performed by the heirs or assigns of Lowry, if they claim under the title then acquired by him. The relation between Carr and Lowry on which the duty depends, was dissolved by Lowry's death, if not before, and his administratrix can be charged to answer only for a breach in his lifetime."

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So also in *Lindeman v. Lindsey*, 69 Pa. 93, owners on opposite sides of the Conodoquinet creek agreed jointly to erect a dam, each to have the use of half the water, with a covenant for themselves, their heirs and assigns, to repair and rebuild; and this covenant was held to run with the land, the dam having been constructed for the mutual benefit and advantage of the parties, with direct relation to the enjoyment and use of the land. "When, therefore," says Mr. Justice SHARSWOOD, "they enter into an agreement to erect such a dam, with a covenant for themselves, their heirs and assigns, to repair, or rebuild it if necessary, it is not a personal covenant merely, but runs with the lands of the respective proprietors, and the stipulations contained in such agreement, in respect to the enjoyment of the water power created by the dam, form the basis of their respective rights. It is sufficient to refer to *Jamison v. McCredy*, 5 W. & S. 129, as a case entirely parallel, if not in point. If the instrument contain the grant of an easement or privilege to either party in the land or the water, against such a grant there is no statute of limitations without actual, hostile, and adverse possession, and certainly no prescription or presumption from mere non-user. Nothing less than an absolute denial of the right, followed by an enjoyment inconsistent with its existence for a period of twenty-one years or more, can amount to an extinguishment of it." The effect of the agreement of 1852 was therefore to adjust and fix the rights of the parties thereto, and of their heirs and assigns. It is of no consequence that in the deeds constituting the chain of title from Cade to Horn no mention of this agreement is made, or of the rights accruing therefrom. The right passed as appurtenant to the land. As the assignee of the land from Cade in fee, Horn has a right to enjoy the benefit of the contract which runs with it.

This action is trespass upon the case, for diversion of the water to the prejudice of the plaintiff's rights as a riparian owner, which, in view of the alleged previous artificial diversion of the waters of the stream, were fixed and determined by the agreement of 1852. Trespass was the proper remedy. The agreement of 1852 established the rights of the parties, and the covenants were to that effect merely. The agreement was equivalent to a grant; whatever may be conveyed by grant

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may be secured by covenant in this form. No one has ever supposed before, as was said in *Lindeman v. Lindsey*, *supra*, that upon a grant by deed of an easement or privilege upon land, or land covered with water, by one man to another, the remedy for a disturbance of such easement or privilege was an action of covenant upon the deed. Take a common case of the grant or reservation of a right of way. Surely an action on the case may be maintained by the grantee for the obstruction of it, as well against the grantor and those claiming under him as against strangers. The books are full of such cases, in which no such point was made; citing *Watson v. Bioren*, 1 S. & R. 227; *Kirkham v. Sharp*, 1 Wh. 333; *Jamison v. McCredy*, 5 W. & S. 129; *Van Meter v. Hankinson*, 6 Wh. 307; *Ebner v. Stichter*, 19 Pa. 19.

It is true that Horn is the assignee of part only of the forty-four acres held by Cade, to which this covenant is applied, but his rights as a riparian owner are in no way impaired by this. If, after the water leaves the tail-race of his mill, others avail themselves of its power, we cannot see how this can affect Miller. But non constat that any other wheel will be placed on any other part of Cade's tract. One thing is certain, that the mere apprehension of this cannot excuse Miller for diverting the water of the stream, in violation of the contract. It will be time enough to provide for this contingency when it happens.

We are of the opinion that the learned judge of the court below erred in entering judgment for the defendant, non obstante veredicto.

The judgment is therefore reversed, and judgment is now entered on the verdict for the plaintiff for \$52.

APPENDIX.

DE LA CUESTA v. INSURANCE CO.

(Ante, p. 62.)

In *Dawson v. Insurance Co.*, reported with the above case, ante 66-70, HARE, P. J., in discharging the rule for a new trial, December 28, 1888, delivered the following opinion: *

This case is substantially the same as that of *Cunningham v. Insurance Co.*, and, like it, grew out of certain resolutions adopted by the North American insurance company, at a meeting held November 5, 1880. They are as follows:

"Resolved, That the capital stock of this company be increased \$1,000,000, by the issue of one hundred thousand shares at par to the stockholders, in proportion of one share for each two shares held by them on the day they shall respectively subscribe for the same,—they subscribing an agreement to pay ten dollars per share for the stock, and also ten dollars per share for the privilege of subscribing, the proceeds of which privilege shall be added to the surplus fund of the company. Subscriptions will be received until or on the first day of February, 1881, at which time the right to subscribe shall cease.

"All shares not subscribed for on or before the first of February, 1881, and those the price of which is not fully paid by the fifteenth of December, 1881, will then be sold at public auction in this city, on thirty days' notice in the papers, for the benefit of the company, but at not less than twenty dollars per share."

Cunningham's Appeal [108 Pa. 546] establishes that so much of the above resolutions as required the payment of a bonus of ten per cent "for the privilege of subscribing," and that the stock should "be sold for the benefit of the company," if the

* This opinion, which was before the Supreme Court when the case was argued, is printed here at the request of members of the bar received since the report of the principal case was put into plates.

money were not forthcoming, was unauthorized and void. The plaintiff was of this opinion from the outset, but finding himself in the power of the company, and having no legal means of redress, he paid the ten per cent bonus, in addition to the par value of the shares, to save his stock from being sacrificed, and brought this suit to compel the company to refund.

Money paid voluntarily with a knowledge of the facts cannot be recovered back. No legal principle is better established than this, and few rest on stronger considerations. It is for the public good that there should be an end to litigation, and that controversies should be determined while the circumstances are fresh in the minds of the witnesses. If debtors could yield to the demands of their creditors under protest, and then re-open the question by an allegation that the claim was unjust, the opposite party might, in his turn, resort to the same device, and the dispute be indefinitely prolonged.

As the rule originally stood, it did not admit of an exception in a merely legal tribunal and in view of the remedies provided by the earlier common law. If money was extorted fraudulently, or by duress of the plaintiff's goods or person, he might bring an action of tort, but he could not maintain debt or assumpsit. There was no express contract, and the courts were not yet prepared to feign that the defendant had promised to refund that which he took and persistently claimed as his own. Such was the case at law, and the bare fact that the payment was made under the pressure of a threat to arrest the plaintiff, or take his goods, did not warrant an application to a court of equity.

Where, however, the parties were in a fiduciary relation, or a power which had been conferred for a beneficial end was used as a means of compelling persons who were affected by it to pay what they did not owe, a court of equity might be asked to intervene by an injunction. If a bailee or agent used his hold on the goods which were intrusted to his care, as a means of wringing money from the principal or bailor, or there was a like abuse of authority or confidence in any other relation of life or trade, the case fell under one of the main heads of equity jurisdiction, and the strong arm of a chancellor might be put forth to compel restitution or prevent the sale: See *Wood v. Rowcliffe*, 3 Hare 304; *McGowin v. Remington*, 12 Pa. 56.

There were, nevertheless, instances where a bill could not

be filed in time, and the complainant had to choose between submission to an illegal pecuniary demand and a loss of property which he was anxious to retain. It was indeed suggested, during the argument for a new trial, that if the former course was adopted the plaintiff was not only remediless at law, but lost the aid of a chancellor. This view would seem to be without any sufficient basis. If the circumstances originally brought the case within the jurisdiction of equity, the bill ought not to be dismissed because the wrong has been accomplished, and it has, on the contrary, been decided that what the defendant would have been enjoined from exacting he may be decreed to restore. Such, in effect, is the decree in the recent case of *Cunningham's App.*, 108 Pa. 546, 557.

The rise of the action for money had and received changed the course of procedure, without varying the doctrines on which relief is based. It is an adaptation of common-law forms to equitable principles; giving a remedy by suit in many cases where it was originally necessary to file a bill, and among others, where a payment is made to prevent a sacrifice of the plaintiff's property. This is emphatically true in Pennsylvania, where it has been established from an early period that if a plaintiff has a claim for money which could be enforced through a bill in equity, it may equally be recovered in an action for money had and received: See *Martzell v. Stauffer*, 3 P. & W. 398; *Aycinena v. Peries*, 6 W. & S. 243, 258. But on this very account, the action cannot be maintained unless the circumstances take the case out of the general rule, as stated in the beginning of this opinion. It must not only appear that the defendant made the payment under an undue pressure amounting to duress, but that he had no legal means of regaining his freedom of action. This is not only from the general rule that equitable remedies should not be employed, where redress can be had in the ordinary course of law, but because a man who can set himself free cannot justly be said to be coerced.

The rule, as stated by Chief Justice TINDALL, in *Valpy v. Manly*, 1 C. B. 594, and cited and followed in *Baker v. The Cincinnati*, 11 Ohio St. 534, 539, is as follows: A payment made "under an immediate and urgent necessity, or for the purpose of preserving or redeeming one's person or goods," may be recovered back in an action for money had and received.

The law is so held in Pennsylvania, and, generally, in England and the United States. See *Hospital v. Philadelphia County*, 24 Pa. 229; *White v. Heylman*, 34 Pa. 142; *Miller v. Miller*, 68 Pa. 486; *Shaw v. Allegheny*, 115 Pa. 46; *Lawrence v. Philadelphia*, 14 W. N. 421; *Boston Glass Co. v. Boston*, 4 Metc. 181; *Lafayette R. Co. v. Patterson*, 41 Ind. 313. X

What constitutes the immediate and urgent necessity, above referred to, has been variously considered, but may be said in general to exist wherever a man has such a control or possession as enables him to dispose arbitrarily of his neighbor's property, and use it as a means of enforcing an unfounded demand: *Astley v. Reynolds*, 2 Str. 916; *Boston Glass Co. v. Boston*, 4 Metc. 186; *Harmony v. Bingham*, 12 N. Y. 99, 112 (62 Am. Dec. 142); *Briggs v. Boyd*, 56 N. Y. 289; *Ferguson v. Winslow*, 24 Minn. 385; *Atlee v. Backhouse*, 3 N. & H. 633, 649. A bare threat is not within the rule, because force may be opposed by force, or a call made for the police. The case is widely different, where chattels are illegally withheld or offered for sale. The title is not divested, but the owner loses the possession and is remitted to an action for damages, which may be fruitless if the wrongdoer is insolvent: *Shaw v. Woodcock*, 7 B. & C. 84.

Such, at least, are the English decisions, and they have been followed with less reason in the United States, where replevin will lie for specific goods: *Motz v. Mitchell*, 91 Pa. 114, 117; *White v. Heylman*, 34 Pa. 142; *Lafayette R. Co. v. Patterson*, 41 Ind. 312; *Ferguson v. Winslow*, 34 Minn. 384. The remark does not apply to a sale of land under a lien which has expired, or that is manifestly invalid from any other cause: *Union Ins. Co. v. Allegheny*, 101 Pa. 250. The owner's title and possession are undisturbed, and the cloud cast upon his title is not such a duress as will render a payment under protest involuntary, or warrant a recourse to equity: See *Heywood v. Buffalo*, 14 N. Y. 534, 538; *Mayor v. Miserole*, 26 Wend. 132; *Van Doran v. Mayor*, 9 Paige 388. When, however, the plaintiff is compelled to choose between a sale that will pass the title and paying what he does not owe, he may adopt the latter course, whether the property is real or personal, and obtain restitution through an action for money had and received: *Hospital v. Philadelphia Co.*, 24 Pa. 229; *Boston Glass Co. v. Boston*, 4 Metc. 181; *Close v. Phipps*, 7 M. & G. 686.

In the case last cited, the defendant advertised the plaintiff's property for sale under a power contained in a deed of mortgage, and refused to stay the proceedings, notwithstanding a tender of debt, interest and costs, unless the plaintiff would defray certain expenses for which he was not legally answerable. The plaintiff paid the money under protest in order to save his land, and brought an action for money had and received. The court gave judgment in his favor, on the ground that "the money was obtained by what the law would call duress, as the plaintiff was obliged either to pay it or suffer his estate to be sold and incur the expense and risk of a bill in equity." This case is singularly analogous to the present. There, as here, the defendant was using a legal right for an injurious end, and it was held that the plaintiff might, instead of invoking the aid of a chancellor, yield an enforced submission and then seek redress at law.

It is, however, needless to look abroad for authorities when there is a case at hand, growing out of the same facts and covering the entire ground. I refer to Cunningham's Appeal, already cited. The controversy grew out of the resolutions which are before us now, and a bill was filed to restrain the insurance company from demanding the "ten per cent bonus," and for a decree that the complainants should receive their stock on paying the par value of the shares. The relief thus asked for was granted, and it was also decreed that "if they or any of them have, under protest, paid such bonus or charges on the said stock shares, that the sum be refunded to them with interest."

This decision determined both the questions raised in the present suit, that the ten dollar bonus was illegal, and that the defendants cannot retain money which must be regarded as the plaintiff's, because it never became equitably their own.

In delivering judgment, the court observed that "the company had no power to append a condition to the statute to suit their own purposes, and to squeeze out of the corporation all those who would not or could not pay to them their bonus." This remark, and the entire judgment, was criticised during the argument for a new trial, as founded on principles which were not applicable to the facts. The resolution was adopted in the belief that it was legal, with a view to increase the capital of the company, and had no sinister or ulterior object. If the criticism were accurate, it would still be the duty of a sub-

ordinate tribunal to follow the rule laid down by the court of last resort in a case which is not only analogous but the same. I do not, however, understand that Mr. Justice GORDON intended to impugn the motives of the directors of the North American insurance company, or to assert that their purpose was intentionally injurious to the stockholders. The high character of the board and of the counsel under whose advice they acted, forbid such a thought. What his remark implies is, that if such a stretch of authority be tolerated, it will be used, as it has often been, as a means of extruding stockholders who are unable or unwilling to comply with the illegal conditions attached to an issue of new stock, and placing the company under the control of financiers or speculators by whom the plan has been devised.

In considering an act which is *ultra vires*, the question is not as to the motives with which it is done, on one side, or resisted on the other. The jurisdiction of a court of equity is to a great extent preventive, to shut out temptation; and may be exercised, not only where there is, but that there may not be fraud. Such is the rule as to purchases made by a trustee at his own sale, and it applies where a power, however legal, is used as a means of obtaining what is not due. The court need not, under these circumstances, inquire what were the defendant's motives, or whether he believed himself entitled to what he claimed; it is enough, that the parties stood in such an unequal relation as to leave the plaintiff no choice between yielding to an unfounded claim and suffering a greater deprivation: *Ferguson v. Winslow*, 24 Minn. 385; *Parker v. Railroad*, 7 M. & G. 253; *Beckwith v. Frisbie*, 32 Ind. 559, 566. The case of *Close v. Phipps* goes to this extent, and is sustained by *Cunningham's Appeal* and the main current of decision.

I may here advert to a class of cases which are governed by a different rule. It is that money paid under the compulsion of legal proceedings cannot be recovered, because the effect would be to postpone the decision in the pending suit. Or, to state the principle somewhat differently, if the plaintiff could have brought the question to the test of a decision in a mode prescribed by law, the payment is not less voluntary because made under protest: *Wharton v. Birmingham Bor.*, 37 Pa. 371; *Stanly v. Supervisors*, 121 U. S. 535, 550; 105 U. S. 305, 316. The law was so held in the leading case of *Marriott v.*

Hampton, 7 Term 265, which has been followed wherever the circumstances did not constitute an exception.

The rule will nevertheless be read in the light of its principle, which is that a man who might have had a hearing is as much precluded as if he had actually appeared and made defence. A tenant whose goods are distrained for rent may bring the case before a jury by issuing a replevin, and if he neglects the opportunity, cannot subsequently maintain that the rent was not due: *Knibbs v. Hall*, 1 Esp. 84; *Colwell v. Peden*, 3 W. 327; *Peebles v. Pittsburgh*, 101 Pa. 304, 309; *Harmony v. Bingham*, 12 N. Y. 99, 110 (62 Am. Dec. 142). But the rule does not apply to a distraint by a tax collector, because replevin is limited in England to cases growing out of a distress, and cannot be maintained in Pennsylvania for goods that are actually or constructively in custodia legis: See *Preston v. Boston*, 12 Pick. 7, 14; *Bradford v. Chicago*, 25 Ill. 411, 420; and the validity of the assessment may consequently be tested by a payment under protest and action brought to compel repayment: *Boston Glass Co. v. Boston*, 4 Metc. 187.

The case of the *Union Ins. Co. v. Allegheny*, 101 Pa. 250, falls under the above head. The city had levied upon and was about to sell the plaintiff's land, under a lien for taxes which had expired. He paid the amount claimed under protest, and the court held that there was no such urgent need as would justify this course or entitle him to recover the money back. The sale would leave the plaintiff's title and possession intact, and confer no right on the purchaser. If the latter brought ejectment, the suit would fail. There was consequently no such pressure as could control the plaintiff's will and render a payment under protest involuntary, and the proper remedy for the cloud thrown on his title was a bill in equity. The decisions in New York go further and to the point that, when the defect of a tax sale appears on the face of the proceedings, no cloud is really cast on the plaintiff's right, and he can neither come into equity for relief nor pay the amount and recover it back at law: *Mayor v. Miserole*, 26 Wend. 132; *Van Doran v. Mayor*, 9 Paige 388; *Heywood v. Buffalo*, 14 N. Y. 534, 538, 541; *Dean v. Madison*, 9 Wis. 402; *Bicknell v. Story*, 36 Cal. 273. When, however, the question arose in *Shaw v. Allegheny*, 115 Pa. 46, under a judgment which had been entered without notice on an invalid lien for taxes, the court held that the plaintiff

iff was entitled to relief in equity, and that, as he had applied for an injunction without success, he might well pay the amount under protest and maintain assumpsit for money had and received.

It was contended on the defendant's behalf, in the present instance, on the strength of the case last cited and the Union Ins. Co. v. Allegheny, that, to render a payment under protest involuntary, it must appear, not only that the plaintiff was remediless at law, but that he knocked at the door of chancery and was refused. Thus stated, the rule is contrary to the main current of decision, and I do not think that it can fairly be deduced from the language held in either of the above cases. The question there arose out of a levy of a tax on land, under exceptional circumstances, and the judgment should be read in the light of the facts. It is established that when an assessment errs from excess, the tax-payer cannot treat the whole as void, or pay under protest and maintain an action for money had and received, but should tender what is really due and apply to a court of equity to enjoin the collection of the residue: *Stanly v. Supervisors*, 120 U. S. 585-557; *Cummings v. National Bank*, 101 U. S. 163.

But the preponderance of authorities is, that, whatever the rule may be in the case of real estate, an injunction will not be issued simply to prevent the sale of personal property for an illegal tax, because the payment may be made under protest and the collector or municipality compelled to refund by a suit: *Dean v. Todd*, 22 Mo. 90; *Twining v. Stockbridge*, 33 Wis. 505; *Milwaukee v. Koeffler*, 116 U. S. 219, 225. These cases are consistent with the acknowledged right to an injunction, where the proceeding is invalid from a latent defect and will cast a cloud on the plaintiff's title or produce irreparable mischief in some other way: *Hospital v. Philadelphia Co.*, 24 Pa. 229; *Miller v. Gorman*, 38 Pa. 309; *Union Pacific Ry. Co. v. Cheyenne*, 113 U. S. 516; *Heywood v. Buffalo*, 14 N. Y. 534, 541; *High on Injunctions*, § 366. The numerous and conflicting decisions arising under the above head are a class apart, affected by considerations which concern the collection of the revenue; and, as I have endeavored to show, no rule is better settled than that a payment made under protest, to regain possession of goods, or to prevent a sale that will pass the title to land, is involuntary, and may be recovered back.

The authorities, as a whole, justify the conclusion that the detention or sale of property for the purpose or with the effect of depriving the owner of his day in court, is a distinct ground for equitable relief which cannot be administered in chancery consistently with the right to a trial by jury, and has been developed through the action for money had and received. The hardship lies in compelling the person on whom the demand is made to lose his goods or pay an amount which may not be due, without an opportunity of bringing the case to the test of a legal decision, and is equally great whether the person who makes the demand does or does not believe that it is just. Either party may prove to be in the wrong, and the situation is attended with risk to both. The goods may be worth much more to the owner than the sum in dispute, or damages be assessed against the party by whom they are taken or withheld to an amount which is greatly in excess of what he would have gained had the verdict been in his favor, and each should welcome any method which will lead to an equitable settlement of the controversy. Such is the tendency of a payment under protest, because the issue which it presents is whether the debt which the plaintiff paid was due, and if this is decided in his favor, the defendant is simply compelled to refund what he ought not to have claimed. It should consequently be favored wherever the plaintiff can preserve his property in no other way, and will be put to an action of damages if he does not pay.

The rule for a new trial is discharged.

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ACCOUNTS.

1. When an executor's account has been confirmed and the money paid out under a decree of distribution, it is too late to have the account reviewed for the purpose of following the money in the hands of the distributees; and the decision in *Keim's App.*, 125 Pa. 480, might well have been rested on this ground alone. *High's Estate*, 222.

(a) One to whom real estate had been devised for life with remainder to his children, but who never had any children, sold the land, as trustee, in pursuance of a decree under the act of April 18, 1853, P. L. 508. After his death, his executrix settled an account, charging herself with the principal arising from said sale as due to the estate of the deviser:

2. Such account having been confirmed, and said fund awarded by the Orphans' Court to the administrator de bonis non, etc., of the deviser, the executrix had no standing, at the audit of the administrator's account, to claim the fund back on the ground that the sale under the act of 1853 enlarged the life-tenant's estate to a fee. *Ibid.*, 222.

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AGENT.

1. It is a rule of public policy that an agent for the sale of property cannot at the same time act as the agent for the purchase thereof, or interest himself therein, and thus become entitled to compensation from both vendor and purchaser: *Everhart v. Searle*, 71 Pa. 256; *Penna. R. Co. v. Flanigan*, 112 Pa. 558. *Rice v. Davis*, 439.

2. Such a rule, intended to be preventive of the possibility of wrong, rather than remedial of actual wrong done, should be rigidly enforced, unless it clearly appear that the persons for whose protection it is intended agreed expressly, with a knowledge of all the circumstances, to waive their rights thereunder. *Ibid.*, 439.

3. If an agent of the owner for the sale of stock receive from a purchaser thereof compensation for his services, the fact that such receipt was with the knowledge and without the objection of the vendor, will not constitute a waiver of the rule and preserve the right of the agent to be compensated by the vendor. *Ibid.*, 439.

ANNUITY.

1. The rule that interest upon legacies does not commence to accrue until one year after the death of the testator, being one of administrative convenience only, gives way at all times to the testator's intent, whether express, or whether implied from the general scheme of the will, from particular expressions, or from the situation of the legatee, especially with reference to the testator. *Flickwir's Estate*, 374.

2. There is no substantial difference, in legal aspect, between the gift of an annuity for life, and one of the interest or income of a fund for life; nor between the gift simply of interest, and that of interest payable annually: in all these cases, if no actual intent to the contrary appear, the annuity, interest, or income commences to accrue to the legatee at the death of the testator. *Ibid.*, 374.

APPEALS.

See SUPREME COURT.

ASSIGNMENT, EQUITABLE.

1. When a life policy is issued to a creditor who holds it as security for his debt, the insured having a resulting equitable interest therein, a parol equitable assignment of such interest by the insured to another creditor, perfected by a transfer of the legal title from the beneficiary, may be valid as against the administrator of the insured. *Shaak v. Meily*, 161.

2. In an action by the administrator of the insured against such assignee, for the proceeds of the policy collected by him, proof of the fact that, before the assignment of it to the defendant, the beneficiary named in the policy had made a general assignment for the benefit of creditors, will not in any way aid a recovery by the plaintiff. *Ibid.*, 161.

ASSIGNMENT OF ERROR.

See SUPREME COURT.

ATTACHMENT-EXECUTION.

A creditor, attaching the interest of a primary beneficiary in a fund held in trust for distribution to a remainder-man, by writ served upon the trustee after the death of the debtor, must be confined to the share of the income accruing to the primary beneficiary before the latter's death. *Comly's Estate*, 153.

ATTORNEY-AT-LAW.

1. As a majority of partners, while acting fairly and in good faith, and

keeping within the scope and purposes of the partnership, have power to direct the course of the partnership affairs, they may give a valid warrant of attorney in the name of the firm, authorizing a suit upon a contract made by it, and this notwithstanding the dissent of a minority. *Clarke v. Railroad Co.*, 408.

2. Ordinarily, it would be error, after the filing of such a warrant, to make absolute a rule for a sufficient warrant, and to stay the suit; but if it appear that the parties who gave the warrant have been divested of all interest in the firm, and that what was submitted by the parties and decided by the court was the effect of the divesting acts, such order was harmless and will not be disturbed. *Ibid.*, 408.

BANKS AND BANKING.

1. When the amount of a check, left with a bank for collection, is credited to a depositor as cash, it may be charged back to him in case it turns out to be worthless, unless the bank has been negligent, or has done something to mislead the depositor into acting, to his injury, on the faith of its goodness: the depositor has no right to be misled by the mere credit of the check as cash. *Rapp v. National Bank*, 426.

(a) On August 12th, a stranger called on the plaintiffs in Philadelphia, purchased goods to the amount of \$146, and offered in payment a certified check on the Merchants' Bank of New York for \$900. Before accepting it, the plaintiffs submitted the check to the cashier of the defendant bank, who advised them not to take it, for fear it might be "raised."

(b) There was nothing on its face to indicate any alteration, and the cashier's advice was based simply on the nature of the proposed transaction with the stranger. The cashier further said that the only thing he could do for the plaintiffs would be to send the check on for collection and see whether it would be paid, and, if it was paid and kept, it might be supposed all right.

(c) After seeing the stranger and getting his assent, the plaintiffs deposited the check to their account with the defendant bank; but, as they did not have their pass-book, it was not credited therein on that day. On August 14th, the pass-book was brought to the bank, the deposit entered in it, and on the same day the plaintiffs paid to the stranger the difference between \$900 and \$146.

(d) The defendant bank sent the check on August 12th to its New York correspondent, and it was paid in due course by the Merchants' Bank. A month later, in balancing the book of the drawer, the Merchants' Bank learned that the check had been altered, before certification, from \$7.75 to \$900. Thereupon the defendant's correspondent returned the \$900 to the Merchants' Bank, and charged the same against the defendant:

2. The defendant, having allowed this charge, had the right to charge the check against the plaintiffs' deposit account, each person or bank who had received the money, or a credit, upon the check, being bound to restore it when the fraud was discovered: *Clews v. Bank*, 89 N. Y. 418; *Espy v. Bank*, 18 Wall. 619; *Bank v. Bank*, 55 N. Y. 215, and *Natl. Park Bank v. Bank*, 114 N. Y. 33, distinguished. *Ibid.*, 426.

BANK CHECK.

See BANKS AND BANKING.

BAY-WINDOWS.

See SIDEWALKS.

BILL OF REVIEW.

See ACCOUNTS.

BOROUGHES.

1. In assessing damages for the laying out of a borough street, interest from the date of the taking should be awarded to the owner as a part of his damages; the provision in § 27, act of April 3, 1851, P. L. 320, amended by § 2, act of May 22, 1883, P. L. 39, that interest shall be allowed "from the date of the adjudication," relating only to the subject of interest upon the award when made. *Weiss v. South Bethlehem Bor.*, 294.

2. The foot ways, no less than the carriage ways, in cities and boroughs, are under municipal control; and the authorities may determine the extent to which the sidewalks may be obstructed by cellar doors, door-steps, awnings, bay-windows, cornices and the like. *Livingston v. Wolf*, 519.

3. This power must be exercised under regulations that are general and uniform, that are reasonable and certain, and that are in conformity with the constitution and the laws: *Paul v. Carver*, 26 Pa. 223; *Kneedler v. Norristown*, 100 Pa. 368; *Reimer's App.*, 100 Pa. 182. *Ibid.*, 519.

4. Under regulations that are reasonable in character and general in their application, cities and boroughs have power to permit the use of portions of the highways for approaches to and for ornamental work upon buildings standing on the street line. *Ibid.*, 519.

5. A borough ordinance authorizing the use of 3 feet 6 inches of the foot way for cellar entrances, and prohibiting bay-windows projecting more than 28 inches, on a street 60 feet wide, is not unreasonable; and under it an over-hanging balcony and bay-window projecting less than those limits will not be enjoined. *Ibid.*, 519.

6. If the conclusion in this case could be regarded as doubtful, the decree dismissing the bill of an adjoining owner for an injunction, would nevertheless be affirmed upon the finding of the master that the structures complained of caused no appreciable injury to the plaintiff. *Ibid.*, 519.

BROKER.

See AGENT.

BRIDGES.

(a) The act of April 13, 1843, P. L. 221, imposes upon the commissioners of the counties of the commonwealth the duty of keeping county bridges in repair. That act, as to Huntingdon county, was repealed by the act of March 11, 1844, P. L. 86. By the act of February 26, 1846, P. L. 64, Blair county was erected out of parts of Huntingdon and Bedford counties:

1. By the act creating Blair county, providing that the officers of said county should be subject to "the same duties as other similar officers" in the other counties of the state, it became the duty of the county commissioners, under the general law, to keep in repair county bridges erected prior to 1846, in territory taken from Huntingdon county. *Shadler v. Blair Co.*, 488.

CASES CONSIDERED.

See Table, "CASES CONSIDERED."

CHECK.

See BANKS AND BANKING.

CITIES.

See BOROUGHs.

1. The certification, as a municipal ordinance, of a bill which was vetoed by the mayor and failed to pass over his veto, will not be compelled by mandamus, on the ground that the veto message was ineffective because sent by mistake to the wrong chamber of councils; its validity cannot be decided in this summary manner. *Commonwealth v. Filler*, 129.

2. So far as § 4, act of May 23, 1874, P. L. 231, relating to the government of cities, requires the mayor to return a vetoed ordinance to councils within ten days, it is mandatory; but the provision that it shall be returned to the branch of councils wherein it originated, is merely directory: Per PAXSON, C. J. *Ibid.*, 129.

3. Under the practice prevailing in the city councils of Philadelphia, it seems that a bill introduced into the common councils, referred without consideration to a joint committee, reported by it to select council of which its chairman is a member, and first passed by that body, originates therein, within the meaning of said act. *Ibid.*, 129.

COERCION.

See VOLUNTARY PAYMENT.

COMMISSIONS.

See AGENT.

CONFLICT OF LAWS.

See POWERS, 1.

CONSTITUTIONAL LAW.

1. Section 4, article XVII. of the constitution, providing that "no railroad, canal or other corporation shall consolidate with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning a parallel or competing line," is not applicable to street-railway companies. *Gyger v. Railroad Co.*, 96.

2. The passenger travel over parallel streets of cities is not necessarily a competing travel; and it is quite clear, therefore, that the sense of "competing," which is the essential sense of the prohibition of the section, is not applicable to the travel upon the streets of cities and towns over street-passenger railways. *Ibid.*, 96.

(a) The act of April 8, 1861, P. L. 258, prohibits, under penalty, the buying, as a hawker or peddler, within the counties of Berks and Franklin, of any butter, eggs, etc., with intent to send the same for sale or barter to any other market out of said counties, without payment of a license fee of \$10 for residents, and \$20 for non-residents of the counties:

3. Said act is not invalid as making discriminations against citizens of other states and in favor of citizens of Pennsylvania; its discriminations are solely against non-residents of the counties named and markets outside thereof, and § 2, article IV. of the federal constitution has nothing to do with distinctions founded on domicile merely. *Rothermel v. Meyerle*, 250.

4. No state has power to make any law which will affect free and unrestrained intercourse and trade between the states; and a state statute imposing imposts or duties upon goods imported into or exported out of the particular state, is in violation of the constitution of the United States and therefore void. *Ibid.*, 250.

5. But the act of 1861 cannot be regarded as laying a tax or impost upon exports from the state, under a principle analogous to that of *Brown v. Maryland*, 12 Wheat. 425; at most it could be no more than a taxing of goods at the time of their purchase, and they remain liable to taxation until transportation to another state is actually commenced: Per Mr. Justice CLARK. *Ibid.*, 250.

6. At all events, and even if said act of 1861 be invalid, under the inter-state commerce clauses of the United States constitution, in the case of the purchase of goods for sale in a market in another state, it is a valid and proper exercise of power as respects persons residing and doing business wholly within this state. *Ibid.*, 250.

7. If a part of a statute which is unconstitutional in its operation, is independent of and readily separable from that which is constitutional, so that the latter may stand by itself, the part that is constitutional may be sustained and enforced, even though the unconstitutional provisions be contained in the same section of the statute. *Ibid.*, 250.

8. The fourteenth amendment to the federal constitution, forbidding any state "to deny to any person within its jurisdiction the equal protection of the laws," did not execute itself so as to repeal, *proprio vigore*, state laws in existence at the time of its adoption, and it cannot be held to have repealed or in any way affected said act of 1861. *Ibid.*, 250.

9. The constitution having fixed the qualifications of voters, it is not in the power of the legislature either to enlarge or abridge them; but legislation may be enacted which merely regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself. *Cusick's Election*, 459.

10. The constitution having provided no machinery for ascertaining whether a particular voter possesses the requisite qualifications, the legis-

lature has power to prescribe the form and nature of the proof by which unregistered electors must establish the existence of a right to vote under the constitution. *Ibid.*, 459.

11. The requirements of § 10, act of January 30, 1874, P. L. 31, as to what the affidavits of unregistered electors shall contain, are not unreasonable nor in conflict with the constitution; and, as a reasonable certainty in the affidavits is all that the law requires, there is no practical difficulty in complying with them. *Ibid.*, 459.

CONTINGENT, OR VESTED?

See WILL.

CONTRACT.

See TIMBER.

CONTRACT FOR SERVICES.

1. When one has rendered personal services to another, merely upon the expectation of a legacy promised, without a contract obligation, the promisee takes his chances of receiving the legacy, and if his expectations are disappointed he can recover nothing. *Miller's Estate*, 239.

2. To sustain a claim against the estate of a decedent, for services rendered under an alleged contract to pay for them after death, either specifically or by way of a legacy, it is indispensable that there be proof of the services actually rendered. *Ibid.*, 239.

3. Evidence, in support of such a claim, which fails to show either the terms of a definite contract to pay, or what services were rendered from which a contract to pay can be implied, is insufficient to authorize the allowance of payment. *Ibid.* 239.

CONTRACT, OR WILL?

See WILL.

CONVERSION.

1. The reason why a testamentary direction to sell real estate works a constructive conversion, is that an actual conversion is thereby made certain; and the estate is treated as having at once the qualities which it must necessarily have when the power of sale is executed. *Sheridan v. Sheridan*, 14.

2. Hence, when a will contains no positive direction to sell, but merely gives the executors a naked power of sale, to be used "if they find it necessary to do so in order to make a fair and equitable division" of the estate in accordance with the will, to work a conversion an actual sale is necessary. *Ibid.*, 14.

CONVEYANCE.

See MARRIED WOMAN.

Where a conveyance is made to two persons as grantees, there is a presumption, in the absence of an express agreement otherwise, that each one

takes an undivided moiety of the property; and, in such case, if either grantee has furnished more than one half the purchase money, the other is indebted to him in an amount necessary to equalize their respective investments. *Kieffer's Estate*, 535.

CORPORATIONS.

(a) A stockholder of a corporation being about to make a written protest against the exaction from him of a bonus upon a subscription to a new issue of stock, the company's president requested him not to write it, agreeing that, under his verbal protest, he should have whatever benefit any one should receive under a written protest by any suit:

1. The effect of the president's agreement was simply a waiver of a written protest, putting the stockholder in the same position he would have occupied if he had written out his protest in a formal manner; it was not an engagement that the stockholder might recover back the bonus paid by him, if any one else should obtain such a recovery. *De la Cuesta v. Insurance Co.*, 62.

2. The coercion which will render a payment under protest involuntary, so that it may be recovered back, must consist of duress either of person or of goods. A mere denial of an incorporeal right, by which a man is placed in a "dilemma" and compelled to choose between conflicting views of the law, is not sufficient for that purpose. *Ibid.*, 62.

3. A stockholder, who has the right, under the law, to subscribe at par for a proportionate part of a new issue of stock, has an adequate remedy in damages for a refusal by the corporation to recognize that right; and a threat to sell such stock to others, unless he agree to pay more than par for it, will not constitute legal duress: *Motz v. Mitchell*, 91 Pa. 114, distinguished. *Ibid.*, 62.

COUNTY BRIDGES.

See BRIDGES.

COURT OF COMMON PLEAS.

See EQUITY.

See PARTITION.

COVENANTS, REAL.

See RIPARIAN OWNERS.

COVERTURE.

See MARRIED WOMAN.

CREDITOR AND DEBTOR.

See MORTGAGE.

See SHERIFF'S SALE.

DAMAGES TO LAND.

1. In assessing damages for the laying out of a public street, in front of

a manufacturing establishment and between it and a railroad, the jury may consider whether the loss of the right of the owners to lay a private siding upon the site of the street, control its use, and keep cars standing thereon at their pleasure, will affect the market value of the property. *Weiss v. South Bethlehem Bor.*, 294.

2. In assessing damages for the laying out of a borough street, interest from the date of the taking should be awarded to the owner as a part of his damages; the provision in § 27, act of April 3, 1851, P. L. 320, amended by § 2, act of May 22, 1883, P. L. 39, that interest shall be allowed "from the date of the adjudication," relating only to the subject of interest upon the award when made. *Ibid.*, 294.

DEBTOR AND CREDITOR.

See MORTGAGE.

See SHERIFF'S SALE.

DECEDENTS' ESTATES.

See DISTRIBUTION.

See PARTITION.

1. It is a well-settled rule that when the statute of limitations begins to run against a debt, it will not stop because of the death of either party; and, since the decision of *Yorks' App.*, 110 Pa. 69, this is a rule of general application. *Light's Estate*, 211.

2. When an attempt is made, in the distribution of a decedent's estate in the Orphans' Court, to set off against a legacy a debt from the legatee to the testator, the legatee may plead the statute of limitations, notwithstanding that the debt was not barred at the testator's death. *Ibid.*, 211.

3. The reasoning of *Thompson's App.*, 42 Pa. 345, as respects the statute of limitations, is at best obiter dictum, as the cases on which it is based do not support it, *McClintock's App.*, 29 Pa. 360, being overruled in *Yorks' App.*, 110 Pa. 69, and *Courtenay v. Williams*, 3 Hare 539, is not in accord with the current of our decisions. *Ibid.*, 211.

4. While an adjudication, allowing a claim in a distribution in the Orphans' Court, will toll the bar of the statute of limitations: *Reber's App.*, 125 Pa. 20; the allowance of a dividend upon a debt by a decree of the Court of Common Pleas, distributing funds of an assigned estate, will not have that effect. *Ibid.*, 211.

5. When one has rendered personal services to another, merely upon the expectation of a legacy promised, without a contract obligation, the promisee takes his chances of receiving the legacy, and if his expectations are disappointed he can recover nothing. *Miller's Estate*, 239.

6. To sustain a claim against the estate of a decedent, for services rendered under an alleged contract to pay for them after death, either specifically or by way of a legacy, it is indispensable that there be proof of the services actually rendered. *Ibid.*, 239.

7. Evidence, in support of such a claim, which fails to show either the terms of a definite contract to pay, or what services were rendered from which a contract to pay can be implied, is insufficient to authorize the allowance of payment. *Ibid.*, 239.

8. A residuary legatee, the wife of one of the executors of the testator, in the absence of fraud, may purchase, through the medium of her husband, acting as her agent, the share of another residuary legatee; and, in such circumstances, the rule which prohibits a trustee from buying at his own sale has no application. *Dundas's Estate*, 318.

9. When a residuary legatee sold and conveyed his interest to the wife of one of the executors, at a price ascertained by an estimate made for the purpose by the executors, the fact that, through errors in and omission of data from such estimate, the price was fixed at much less than the share was really worth, will not necessarily invalidate the sale. *Ibid.*, 318.

10. If such errors and omissions were unintentional and honest mistakes, naturally arising from the peculiar state of the assets, and the sale was not tainted by any fraud, it will not be set aside, although the purchaser was represented in the transaction by her husband, and the seller relied entirely upon the statements of the executors. *Ibid.*, 318.

11. At all events, even if such sale were voidable at the election of the seller, he must act with reasonable promptness in moving to have it set aside; and a delay in so moving for two years after the purchaser, learning of his dissatisfaction, offered to re-convey upon re-payment of the price, with interest, is such laches as works an estoppel. *Ibid.*, 318.

12. The Orphans' Court has no jurisdiction to determine the existence of a partnership between a decedent and another, to take cognizance of partnership transactions, and to state an account between the surviving partner and the personal representatives of the deceased: *Wiley's App.*, 84 Pa. 270; *Ainey's App.*, 11 W. N. 568 (2 Penny. 192), followed; *Brown's App.*, 89 Pa. 139, distinguished. *Miller's Estate*, 349.

DEDICATION.

See **STREETS.**

DEED.

See **CONVEYANCE.**

See **MARRIED WOMAN.**

DEPOSITOR.

See **BANKS AND BANKING.**

DIRECTORY, OR MANDATORY?

See **ELECTIONS.**

See **MUNICIPAL ORDINANCES.**

DISABILITIES.

See **MARRIED WOMAN.**

DISTRESS FOR RENT.

1. Under § 1, act of March 21, 1772, 1 Sm. L. 370, authorizing the sale of a distress for rent "after six days' public notice," it is not essential to

the legality of the proceeding that the sale take place on the day fixed by the notice. As an incident to the power to sell, the bailiff has power to make a reasonable adjournment of the sale. *Holland v. Townsend*, 392.

2. An adjournment for one week is a reasonable delay, and will not of itself convert a lawful distress into a trespass; nor is it necessary, in an action of trespass for a sale made after such adjournment, that the cause of the adjournment should affirmatively appear: *Ricketts v. Unangst*, 15 Pa. 90, and *Quinn v. Wallace*, 6 Wh. 452, explained. *Ibid.*, 392.

3. A landlord has the right to impound a distress upon the premises for a reasonable time after the expiration of the five days allowed to the tenant by the act of 1772 for bringing replevin, which, ordinarily, will be until the day of sale in due course; and he may take exclusive possession of that part of the premises in which the distress is impounded. *Ibid.*, 392.

4. The fact that the landlord, after making a distress on his tenants' goods, visited a sub-tenant of a part of the premises, cautioned him to pay no more rent to the mesne tenant, and offered to execute a new lease directly to the sub-tenant for the part of the premises occupied by him, would have no effect upon the legality of the distress. *Ibid.*, 392.

DISTRIBUTION.

See DECEDENTS' ESTATES.

See MARRIED WOMAN.

(a) The will of a testator devised all his estate to his wife in fee, and appointed her his executrix, with full power to sell and convey. Children were born after the date of the will, and for them no provision was made therein.

(b) By a deed reciting the devise to her in fee, but not indicating that she conveyed or intended to convey under the power, or that the deed was made in the course of the administration of the estate, the widow afterward conveyed the real estate devised to her:

1. In such case, the provisions of § 1, act of June 4, 1879, P. L. 88, were inapplicable; and, under § 15, act of April 8, 1833, P. L. 251, the afterborn children were entitled to the same interest in the real estate of testator, "as if he had actually died without any will." *Robeno v. Marlatt*, 35.

2. Such children are not required to look only to the proceeds of the sale made by the widow, as that requirement would deny to them the interest in their father's estate to which they are entitled under the statute. *Ibid.*, 35.

3. When an executor's account has been confirmed and the money paid out under a decree of distribution, it is too late to have the account reviewed for the purpose of following the money in the hands of the distributees; and the decision in *Keim's App.*, 125 Pa. 480, might well have been rested on this ground alone. *High's Estate*, 222.

(a) One to whom real estate had been devised for life with remainder to his children, but who never had any children, sold the land, as trustee, in pursuance of a decree under the act of April 18, 1853, P. L. 503. After his death, his executrix settled an account, charging herself with the principal arising from said sale as due to the estate of the deviser:

4. Such account having been confirmed, and said fund awarded by the Orphans' Court to the administrator de bonis non, etc., of the devisor, the executrix had no standing, at the audit of the administrator's account, to claim the fund back on the ground that the sale under the act of 1853 enlarged the life-tenant's estate to a fee. *Ibid.*, 222.

5. As a general rule, no one can claim upon a distribution in the Orphans' Court except through the decedent, as creditor, heir or legatee; and the exceptions to this rule, established by such cases as *Marshall v. Hoff*, 1 W. 440, and *Miller's App.*, 84 Pa. 391, cannot apply when the fund has been judicially ascertained to belong to the decedent's estate. *Ibid.*, 222.

6. Under a devise to one for life, with remainder to his children "or their heirs," the devisee having died without ever having had children, the remainder never vested in any one; and hence the reversion, subject to the life-estate, remained in the estate of the testator and passed under a residuary clause. *Ibid.*, 222.

(a) Subject to certain bequests to his father, sisters and others, a testator bequeathed the whole of his estate in trust for his wife for life, providing that at her death his daughter should enjoy its benefits until she attained the age of twenty-five years, when she should have an absolute right thereto.

(b) He afterwards directed that in case his wife should outlive said daughter, two thirds of the whole estate should be divided equally, at his wife's death, between his father and sisters, and the remaining one third should become the absolute property of his friend, Pedro Salome, or his heirs forever:

7. The interest of the daughter under the will was a vested estate, subject to be divested by her death before her mother: *McCall's App.*, 86 Pa. 254; *Churchman's App.*, 22 W. N. 131; *Montgomery v. Petriken*, 29 Pa. 118; wherefore, the daughter having died in her minority, during her mother's life, the bequest of the one third to Salome took effect. *Balione's Estate*, 307.

(c) Two thirds of the estate having been diverted by the election of the widow to take against the will, and by the birth of another child not provided for therein, the sum of \$1,633.33 by consent of all parties, was paid to the testator's father and sisters, for a release of their rights, reducing the trust fund thereby to \$697.89:

8. Salome was entitled, in addition to the one third of the trust fund bequeathed to him, to take the other two thirds, under the equitable doctrine that a bequest to a widow will be sequestrated to compensate a legatee disappointed by her election, said two thirds being less than what the widow would have taken under the will, and less than his loss by reason of her election. *Ibid.*, 307.

DIVIDEND.

See JOINT-STOCK COMPANY.

DURESS.

See VOLUNTARY PAYMENT.

EASEMENT.

See RIPARIAN OWNERS.

1. A wall between two buildings of adjoining owners, used as a common wall continuously for a period of more than twenty-one years, becomes a party wall to the properties, whether equally upon the lot of each, or wholly upon the lot of one owner. *McVey v. Durkin*, 418.

2. Where such a wall, condemned by the Philadelphia building inspectors, under the act of May 20, 1857, P. L. 590, has been removed, and another erected in its place and approved by the inspectors, the owner removing and rebuilding is not liable in trespass therefor. *Ibid.*, 418.

EJECTMENT.

See TITLE TO LANDS.

1. Where both parties in ejectment claim by lines and corners marked on the ground, the rule that an official survey duly made and returned, and unquestioned for more than twenty-one years, is conclusively presumed to have been actually made upon the ground as returned, is inapplicable. *Keller v. Over*, 1.

2. Such presumption, being raised only to supply the place of actual proofs, has no application to a case in which the existence of marks upon the ground, establishing where the official survey was actually made, is shown; in which case, the proper location of the tract is to be determined by the jury from such marks: *Grier v. Penna. Coal Co.*, 128 Pa. 79. *Ibid.*, 1.

3. Where there are no marks upon the ground exhibiting the actual location of one of the lines of an official survey duly returned, that line may be fixed by protraction from any known monument on any other known line, by means of the legal presumption that the lines were run upon the ground as returned. *Ibid.*, 1.

4. And when different marked lines are found on the ground, the fact that the official return of survey corresponds with a marked line contended for by one of the parties, is a circumstance proper for the consideration of the jury in determining which of the lines is the true location. *Ibid.*, 1.

5. But, upon the trial of such case, a charge which, while conceding that the marks upon the ground must control in deciding the question of location, directs the jury to apply, in their consideration of the evidence, the presumption that the official survey, being more than twenty-one years old, was made as returned, is misleading. *Ibid.*, 1.

6. A warrant with a survey thereon, duly returned and accepted, gives the warrantee a title to the land covered by it. A junior warrant located on the same land confers no title, for the commonwealth had none to grant. *Mining Co. v. Coal Co.*, 444.

(a) Tracts now owned by the plaintiff were returned into the land office as surveyed north of and adjoining older surveys now owned by the defendant, and the north line of the older tracts was described by its monuments, actually on the ground, as the south line of the younger.

(b) The deeds from the patentee down to the plaintiff followed the de-

scription given by the return of survey. Testimony was offered on the trial to show that, notwithstanding the official description and calls, the plaintiff's tracts were in fact located on top of the older warrants for which they called:

7. The evidence offered was irrelevant and immaterial for the following reasons: (1) It showed no title derived from the commonwealth, because her title passed under the first warrant and survey. (2) Moreover, it showed no title derived from the patentee of the first surveys; this because:

(c) Although the owner of both blocks, yet when he sold the surveys now owned by the plaintiff, he followed the official description of the younger surveys, in his deed, and bounded his grantees on the south by the north line of the older surveys, a well known marked line on the ground;

(d) He neither did nor said anything to mislead his vendees or induce them to think the land he sold them lay elsewhere than on the north of the older surveys; and (e) the north line of the older warrants was actually pointed out on the ground as the south line of the younger block to purchasers through whom the plaintiff claims. *Ibid.*, 444.

8. The vendee, on discovering that he had purchased several tracts having no actual existence, might proceed against the vendor on his covenant or rescind the contract in toto, but could not go over the recognized lines of his purchase and appropriate a corresponding amount of his vendor's adjoining land. *Ibid.*, 444.

9. The lessees of land, demised to them for the production of oil alone, who obtain gas but not oil, and are thereupon dispossessed by ejectment brought upon a forfeiture alleged, have no equity to be reimbursed the expenses of their operations out of the proceeds of the gas obtained. *Palmer v. Truby*, 556.

EJECTMENT BILL.

See EQUITY, JURISDICTION.

See OIL- AND GAS-LEASE.

ELECTION AGAINST WILL.

See WILL, 11.

ELECTIONS.

1. The constitution having fixed the qualifications of voters, it is not in the power of the legislature either to enlarge or abridge them; but legislation may be enacted which merely regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself. *Cusick's Election*, 459.

2. The constitution having provided no machinery for ascertaining whether a particular voter possesses the requisite qualifications, the legislature has power to prescribe the form and nature of the proof by which unregistered electors must establish the existence of a right to vote under the constitution. *Ibid.*, 459.

3. The requirements of § 10, act of January 30, 1874, P. L. 31, as to

what the affidavits of unregistered electors shall contain, are not unreasonable nor in conflict with the constitution; and, as a reasonable certainty in the affidavits is all that the law requires, there is no practical difficulty in complying with them. *Ibid.*, 459.

4. The primary object of said act of 1874 is to prevent fraudulent voting, and it must be so construed as best to carry out that intent; the affidavit of the unregistered voter must therefore be sufficiently specific to show upon its face that he has the right claimed, and also to found thereon an indictment for perjury. *Ibid.*, 459.

5. In view of the object aimed at, and of the positive prohibitions and penal provisions contained in other sections of the act, the provisions of § 10 are not merely directory but are mandatory, and an unregistered elector, whose affidavit is not in compliance therewith, is not entitled to vote. *Ibid.*, 459.

6. A general affidavit averring, in the language of the constitution, the possession of the qualifications therein prescribed, but omitting to give the more specific matters as to residence, taxes, and citizenship, required by said section, is insufficient to authorize the reception of a vote from an unregistered person. *Ibid.*, 459.

7. When an affidavit was in fact properly made, but the election officer neglected to subscribe the jurat, the defect can be cured and the paper reformed upon due proof; but affidavits cannot be reformed by wholesale, and each separate paper requires its independent proof. *Ibid.*, 459.

8. When a petition to contest an election charges frauds in certain districts, only, but the answer makes counter-charges of frauds in other districts, and the testimony admitted under the answer discloses fraudulent votes for the respondent in the latter, the contestants may take advantage of and use such testimony. *Ibid.*, 459.

EMINENT DOMAIN.

See DAMAGES TO LAND.

See STREETS.

EMPLOYER AND EMPLOYEE.

See NEGLIGENCE.

EQUITABLE ASSIGNMENT.

1. When a life policy is issued to a creditor who holds it as security for his debt, the insured having a resulting equitable interest therein, a parol equitable assignment of such interest by the insured to another creditor, perfected by a transfer of the legal title from the beneficiary, may be valid as against the administrator of the insured. *Shaak v. Meily*, 161.

2. In an action by the administrator of the insured against such assignee, for the proceeds of the policy collected by him, proof of the fact that, before the assignment of it to the defendant, the beneficiary named in the policy had made a general assignment for the benefit of creditors, will not in any way aid a recovery by the plaintiff. *Ibid.*, 161.

EQUITABLE CONVERSION.

See CONVERSION.

EQUITY, JURISDICTION.

1. Under § 3, act of March 17, 1845, P. L. 160, and § 1, act of February 14, 1857, P. L. 39, the Courts of Common Pleas throughout the state have ample power to make partition by proceedings in equity, in all cases where the title of the plaintiff is clear. *Sheridan v. Sheridan*, 14.

2. Where, on a bill filed to enjoin the defendant from the further mining of ore and for an account, it is disclosed that the legal right of the defendant to do the acts complained of is the controlling question in the case, and depends upon the construction of the will of a former owner under which both parties claim title, and all right in the defendant under said will is wholly denied by the plaintiff, it is not error to dismiss the bill for want of jurisdiction: *North Penna. Coal Co. v. Snowden*, 42 Pa. 488; *Grubb's App.*, 90 Pa. 229; *Ferguson's App.*, 117 Pa. 426. *Duncan v. Iron Works*, 478.

3. Under a lease which grants to the lessee for oil producing purposes a certain described tract of land, with the exclusive right of boring for oil thereon, but restricts the operations of the lessee to certain specified sites, the lessee has no right of possession, such as will support ejectment, as to any land outside the designated sites: *Duffield v. Hue*, 129 Pa. 94. *Duffield v. Hue*, 602.

4. The lessee, however, has the protection of the entire premises, and equity has jurisdiction to restrain the lessor, or others acting under him, from drilling wells thereon outside of such designated sites, and thereby lessening the production of wells drilled by the lessee, such injury being destructive of his rights and incapable of adequate remedy at law. *Ibid.*, 602.

5. A court of equity may entertain a bill for an injunction against such an interference with the lessee's rights, notwithstanding that the boundaries of the demised premises are disputed, the defendant, who also is in possession under the lessor, denying that the land upon which he is drilling was included by the lessor in the leasehold granted to the plaintiff. *Ibid.*, 602.

EQUITY, PRACTICE.

1. Where a cause in equity is dependent upon oral testimony, it is the proper practice to refer it to a master for a report upon the facts; but the province of the master is merely ancillary, and his work is simply in aid of the court in the performance of its own functions: *Phillips's App.*, 68 Pa. 130. *Gaines v. Brockerhoff*, 175.

2. When, therefore, a master's report comes before the court upon exceptions thereto, so long after the taking of the testimony that the master could have little assistance from his recollection of the appearance and manner of the witnesses, it is not error for the court to find the facts from the testimony reported, and enter a decree thereon: *Herdic's App.*, 58 Pa. 212. *Ibid.*, 175.

3. A judgment at law must sustain itself as a whole, and the reasons

stated in the opinion of the judge are technically no part of the case; but in equity, especially when a claim has been dismissed without prejudice, the opinion of the chancellor is an integral part of the proceedings, and must be looked at to gather the exact tenor and extent of the decision. *Miller's Estate*, 349.

ERROR AND APPEAL.

See SUPREME COURT.

ESTATES.

See WILL.

ESTOPPEL.

See FRAUD, 4.

1. The doctrine of estoppel in pais has been very much expanded, in modern times, particularly in Pennsylvania; and, while silence, in ignorance of one's own right, or of another's expenditure under a claim of right, will not estop, yet mere silence, with knowledge, is evidence from which a jury may find an estoppel, on the ground that the knowledge created a duty to speak. *Logan v. Gardner*, 588.

2. When a person under disability has made a deed which is voidable on account thereof, and after removal of the disability, the grantee, with the grantor's knowledge, made expenditures in placing improvements upon the land, it is not necessary, to estop from a disaffirmance of the deed, that the grantor should have positively encouraged the improvements. *Ibid.*, 588.

EVIDENCE.

See WITNESS.

1. In an action wherein the plaintiff seeks to recover damages for the breach of a contract, a notice of special matter, given by him in a former action between the parties, whereby as a defence thereto he set up the same breach of contract and claimed damages therefor much less in amount than he now claims, is admissible as a previous declaration made by him on the subject of the extent of the injury complained of. *Lambert v. Jones*, 31.

2. Although a plaintiff in a cause may not be absolutely concluded by his own testimony as a witness, yet, when he has testified in a circumstantial manner as to a fact peculiarly within his knowledge, and which, if believed, would prevent his recovery, his testimony should not be ignored on the ground that he may have been mistaken. *Sandford v. Railroad Co.*, 84.

3. When one has rendered personal services to another, merely upon the expectation of a legacy promised, without a contract obligation, the promisee takes his chances of receiving the legacy, and if his expectations are disappointed he can recover nothing. *Miller's Estate*, 239.

4. To sustain a claim against the estate of a decedent, for services rendered under an alleged contract to pay for them after death, either specifically or by way of a legacy, it is indispensable that there be proof of the services actually rendered. *Ibid.* 239.

5. Evidence, in support of such a claim, which fails to show either the terms of a definite contract to pay, or what services were rendered from which a contract to pay can be implied, is insufficient to authorize the allowance of payment. *Ibid.*, 239.

6. Self-serving and consonant declarations of a party to an action, whether verbal or by letter, and though made ante litem motam, are inadmissible, unless when a part of the *res gestæ*, or offered to rebut evidence of a want of credibility or of a recent fabrication: *Packer v. Gonsalus*, 1 S. & R. 526; *Henderson v. Jones*, 10 S. & R. 322; *Craig v. Craig*, 5 R. 91; *McKee v. Jones*, 6 Pa. 425, distinguished. *Crooks v. Bunn*, 368.

7. The delivery of a patent for a tract of land by the commonwealth is an admission that all previous formalities and requisites have been complied with, and passes the title to the grantee. The patent is therefore evidence, *prima facie*, of a survey and return in accordance with the description contained in it. *Bushey v. Iron Co.*, 541.

8. A plaintiff having shown an application for land, a warrant issued thereon, and a patent to his grantor for the land described in the warrant, has a *prima facie* case on which he may rest without showing the return of the survey, made under the warrant, into the land office. *Ibid.*, 541.

EXECUTORS AND ADMINISTRATORS.

See ACCOUNTS.

See TRUSTEES.

FALSE IMPRISONMENT.

(a) In an action for false imprisonment and malicious prosecution, the plaintiff's testimony showed that he went with his father to the defendants' store, to complain of an alleged insult to his mother a few days previously, and in a violent manner remarked that he would like to thrash the man who insulted her.

(b) The defendants, having twice ordered the plaintiff and his father to leave the store, sent for an officer and told him to arrest them. The officer took them before a magistrate on a charge of "breach of the peace in using threats and inciting to riot." They were committed for trial, but afterwards discharged on habeas corpus:

1. The plaintiff's own case showing that he was in the wrong, that when arrested he had no intention of obeying the order to leave the store, and that the substantial charge, to wit, the breach of the peace, was true, he was not entitled to recover either for false imprisonment or malicious prosecution. *Sloan v. Schomaker*, 382.

2. Whether to a declaration charging false imprisonment and assault and battery, an amended statement of claim may be filed, under the act of May 25, 1887, P. L. 271, charging, additionally, that the defendants falsely and maliciously and without probable cause directed and procured the arrest of the plaintiff, not considered. *Ibid.*, 382.

FELLOW-SERVANT.

See NEGLIGENCE.

FIRE INSURANCE.See **INSURANCE, FIRE.****FRAUD.**

1. A residuary legatee, the wife of one of the executors of the testator, in the absence of fraud, may purchase, through the medium of her husband, acting as her agent, the share of another residuary legatee; and, in such circumstances, the rule which prohibits a trustee from buying at his own sale has no application. *Dundas's Estate*, 318.

2. When a residuary legatee sold and conveyed his interest to the wife of one of the executors, at a price ascertained by an estimate made for the purpose by the executors, the fact that, through errors in and omission of data from such estimate, the price was fixed at much less than the share was really worth, will not necessarily invalidate the sale. *Ibid.*, 318.

3. If such errors and omissions were unintentional and honest mistakes, naturally arising from the peculiar state of the assets, and the sale was not tainted by any fraud, it will not be set aside, although the purchaser was represented in the transaction by her husband, and the seller relied entirely upon the statements of the executors. *Ibid.*, 318.

4. At all events, even if such sale were voidable at the election of the seller, he must act with reasonable promptness in moving to have it set aside; and a delay in so moving for two years after the purchaser, learning of his dissatisfaction, offered to re-convey upon re-payment of the price, with interest, is such laches as works an estoppel. *Ibid.*, 318.

" HEIRS."See **WILL.****HIGHWAYS.**See **STREETS.****HUSBAND AND WIFE.**See **MARRIED WOMAN.****INCOME.**See **JOINT-STOCK COMPANY.****INFANT.**

1. The disabilities of infancy and coverture are separate and independent. The mere fact that they both occur in connection with the same act, does not give either any greater force than it would have had separately; accordingly, an infant feme-covert having properly executed a deed, the only objection to be met is that of infancy. *Logan v. Gardner*, 588.

2. The weight of authority now is that the deed of an infant is voidable only; that the title passes by it, and will remain in the grantee until some clear act of disaffirmance by the grantor after coming of age, and that such deed may be affirmed by acts much less formal than would be required to avoid it, and clearly by an estoppel. *Ibid.*, 588.

3. The dictum of Mr. Chief Justice GIBSON, in *Schrader v. Decker*, 9 Pa. 14, that the deed of an infant feme-covert is absolutely void, must be referred to the unsettled position of the law at that time; and the remark made in *Williams v. Baker*, 71 Pa. 476, that a ratification thereof must be by a re-acknowledgment after coming of age, is limited to ratification during coverture. *Ibid.*, 588.

INJUNCTION.

See SIDEWALKS.

INSURANCE, LIFE.

1. When a life policy is issued to a creditor who holds it as security for his debt, the insured having a resulting equitable interest therein, a parol equitable assignment of such interest by the insured to another creditor, perfected by a transfer of the legal title from the beneficiary, may be valid as against the administrator of the insured. *Shaak v. Meily*, 161.

2. In an action by the administrator of the insured against such assignee, for the proceeds of the policy collected by him, proof of the fact that, before the assignment of it to the defendant, the beneficiary named in the policy had made a general assignment for the benefit of creditors, will not in any way aid a recovery by the plaintiff. *Ibid.*, 161.

INSURANCE, FIRE.

1. When, after a candid explanation of his title, a person is advised by a representative of an insurance company to insure certain goods, in which he has an interest, in his own name as owner, and acts upon this advice, the company will be estopped from defending on the ground that his interest in the property did not amount to ownership. *Burson v. Fire Association*, 267.

(a) In arranging with the holder of a fire insurance policy for its renewal, the agent of the insurance company said, "I will make you another policy like the first one, only I will make it so that hereafter, if you wish to continue, we will only give you a receipt; do not have to make a new policy for you:"

2. The assured had a right to suppose that a policy, afterwards delivered to him under this arrangement, was essentially similar to the original policy; and he was not bound by a warranty clause in it, which he did not know of and which had not been in the first policy: *Susq. Ins. Co. v. Swank*, 102 Pa. 17, distinguished. *Ibid.*, 267.

3. But a warranty of sole and unconditional ownership is not broken, as to the insurer, by reason of the fact that the assured had made a "lease" of the goods insured, which amounted in law to a conditional sale, reserving title until full payment of the consideration; the insurer has no standing to assert that such transaction is a legal fraud. *Ibid.*, 267.

4. A recovery to the full extent of the policy may be had, in such a case, when the goods insured have been destroyed by fire, although more than half the price to be paid for them under the lease has been received by the assured, as payments to him on account do not transfer the title pro

tanto, and he must account for the goods to the conditional vendee. *Ibid.*, 267.

5. When a contract provides that it shall become void on default in its performance by one of the parties, such party cannot take advantage of his own wrong by setting up such default, alone, as a means of escaping liability under the contract, unless its terms are clearly to this effect. *Susquehanna Ins. Co. v. Leavy*, 500.

6. An insurance policy provided that on thirty days' default in the payment of interest, or any assessment, on the premium note given therefor, the policy should cease: this stipulation being for the insurer's benefit, the company might waive it, and collect assessments levied after as well as before such default. *Ibid.*, 500.

7. Moreover, such levy and collection are clearly authorized by a by-law which provides that, notwithstanding a failure of the insured to pay the interest and assessments, the directors shall retain the premium note and collect thereon all sums due or to become due during the term for which it was originally given. *Ibid.*, 500.

8. When a policy issued by a mutual company of which all the insured are members, is expressly made and accepted "with reference to the by-laws of the company . . . which are made part of the policy," the policy holder is presumed to have knowledge of and is bound by a by-law, though not appended to the policy. *Ibid.*, 500.

9. The construction given to the by-laws of the Susquehanna Mut. F. Ins. Co., as to the order and manner in which different classes of policies shall be assessed for losses, in *Susquehanna Ins. Co. v. Stauffer*, 125 Pa. 416, and *Thropp v. Insurance Co.*, 125 Pa. 427, reaffirmed and followed: *Susquehanna Ins. Co. v. Gackenbach*, 115 Pa. 492, distinguished. *Ibid.*, 500.

(a) A by-law provided that premium "notes subject to the payment of annual interest, and deposit notes upon which the interests have been paid in advance," should not be assessed until all other notes should have paid assessments equal to the interest paid and to be paid within the next succeeding six months:

10. A premium note subject to the payment of annual interest, upon which no interest has ever been paid, although more than a year has elapsed since its date, is not within the excepted class of notes, and is liable to regular assessment in the first instance. *Ibid.*, 500.

11. When different classes of premium notes are all to be assessed ratably, and their amounts vary according to the form of the policy, the equitable and proper method of assessment is, not by percentages upon their face, but upon the basis of the rating of the risk, applied to the amount insured. *Ibid.*, 500.

INTEREST.

1. The rule that interest upon legacies does not commence to accrue until one year after the death of the testator, being one of administrative convenience only, gives way at all times to the testator's intent, whether express, or whether implied from the general scheme of the will, from particular expressions, or from the situation of the legatee, especially with reference to the testator. *Flickwir's Estate*, 374.

2. There is no substantial difference, in legal aspect, between the gift of

an annuity for life, and one of the interest or income of a fund for life; nor between the gift simply of interest, and that of interest payable annually: in all these cases, if no actual intent to the contrary appear, the annuity, interest, or income commences to accrue to the legatee at the death of the testator. *Ibid.*, 374.

INTER-STATE COMMERCE.

See CONSTITUTIONAL LAW.

JOINT-STOCK COMPANY.

(a) The articles of association of a joint-stock company, formed for the purpose of purchasing, developing and selling mineral lands, provided that the property of the association should be vested in trustees, chosen from among the stockholders, who should have power to purchase, sell and convey both real and personal property.

(b) The articles provided, further, that the interest of each member of the association, in its property, should be represented and measured by his shares of stock, which should be transferable by assignment, recorded in the books of the company, and a surrender of the original stock certificate:

1. Whatever the liability of the members to third persons may be, such an association is an artificial person, capable of acquiring, holding and selling property in its associate capacity; the stockholders therein have no title to its lands, but merely a resulting interest in its assets ascertainable only by an account. *Oliver's Estate*, 43.

2. Such company is not dissolved by the death of a member, nor is the nature of his interest as a stockholder such that it is changed thereby; and a dividend declared upon the stock after his death has the same character, and is governed by the same rules, as though declared in his lifetime. *Ibid.*, 43.

3. Wherefore, when a testator, owning such stock, has bequeathed the income of his estate to one person for life, with a gift of the principal to another in remainder, a dividend upon the stock out of the proceeds of a sale of land, made after his death, the association still retaining its capital unimpaired, is income within the terms of the will. *Ibid.*, 43.

4. Such income, though amounting to more than 1,000 per cent upon the capital, must go to the life-tenant, if earned after the testator's death: *Earp's App.*, 28 Pa. 368; and it must be regarded as so earned when the profit on the sale of the land was due to a discovery of mineral deposits after his death, though that discovery was not made by the company itself. *Ibid.*, 43.

JUDGMENT.

A judgment at law must sustain itself as a whole, and the reasons stated in the opinion of the judge are technically no part of the case; but in equity, especially when a claim has been dismissed without prejudice, the opinion of the chancellor is an integral part of the proceedings, and must be looked at to gather the exact tenor and extent of the decision. *Miller's Estate*, 349.

LACHES.

See FRAUD, 4.

LANDLORD AND TENANT.

See DISTRESS FOR RENT.

LEASEHOLD.

See OIL- AND GAS-LEASE.

LEGACY.

1. When one has rendered personal services to another, merely upon the expectation of a legacy promised, without a contract obligation, the promisee takes his chances of receiving the legacy, and if his expectations are disappointed he can recover nothing. *Miller's Estate*, 239.

2. To sustain a claim against the estate of a decedent, for services rendered under an alleged contract to pay for them after death, either specifically or by way of a legacy, it is indispensable that there be proof of the services actually rendered. *Ibid.*, 239.

3. Evidence, in support of such a claim, which fails to show either the terms of a definite contract to pay, or what services were rendered from which a contract to pay can be implied, is insufficient to authorize the allowance of payment. *Ibid.*, 239.

4. The rule that interest upon legacies does not commence to accrue until one year after the death of the testator, being one of administrative convenience only, gives way at all times to the testator's intent, whether express, or whether implied from the general scheme of the will, from particular expressions, or from the situation of the legatee, especially with reference to the testator. *Flickwir's Estate*, 374.

5. There is no substantial difference, in legal aspect, between the gift of an annuity for life, and one of the interest or income of a fund for life; nor between the gift simply of interest, and that of interest payable annually: in all these cases, if no actual intent to the contrary appear, the annuity, interest, or income commences to accrue to the legatee at the death of the testator. *Ibid.*, 374.

LIFE INSURANCE.

See INSURANCE, LIFE.

LIMITATION OF ACTIONS.

1. It is a well settled rule that when the statute of limitations begins to run against a debt, it will not stop because of the death of either party; and, since the decision of Yorks' App., 110 Pa. 69, this is a rule of general application. *Light's Estate*, 211.

2. When an attempt is made, in the distribution of a decedent's estate in the Orphans' Court, to set off against a legacy a debt from the legatee to the testator, the legatee may plead the statute of limitations, notwithstanding the debt was not barred at the testator's death. *Ibid.*, 211.

3. The reasoning of Thompson's App., 42 Pa. 345, as respects the stat-

ute of limitations, is at best obiter dictum, as the cases on which it is based do not support it, *McClintock's App.*, 29 Pa. 360, being overruled in *Yorks' App.*, 110 Pa. 69, and *Courtenay v. Williams*, 3 Hare 589, is not in accord with the current of our decisions. *Ibid.*, 211.

4. While an adjudication, allowing a claim in a distribution in the Orphans' Court, will toll the bar of the statute of limitations: *Reber's App.*, 125 Pa. 20; the allowance of a dividend upon a debt by a decree of the Court of Common Pleas, distributing funds of an assigned estate, will not have that effect. *Ibid.*, 211.

5. The payment of part of a debt, by an assignee for creditors of the debtor, will not keep the debt alive by implying a new promise of the assignor to pay it, because the assignee is not the agent of the assignor for that purpose, and his powers are limited by the scope of his official duties. *Ibid.*, 211.

MALICIOUS PROSECUTION.

See FALSE IMPRISONMENT.

MANDAMUS.

1. The writ of mandamus is not a proper remedy, except when there is a clear legal right in the relator, a corresponding duty in the defendant, and the want of any other adequate, appropriate and specific remedy: *Commonwealth v. Pittsburgh*, 34 Pa. 496; *Lehigh Water Co.'s App.*, 102 Pa. 515. *Commonwealth v. Filler*, 129.

2. The certification, as a municipal ordinance, of a bill which was vetoed by the mayor and failed to pass over his veto, will not be compelled by mandamus, on the ground that the veto message was ineffective because sent by mistake to the wrong chamber of councils; its validity cannot be decided in this summary manner. *Ibid.*, 129.

MANDATORY, OR DIRECTORY?

See ELECTIONS.

See MUNICIPAL ORDINANCES.

MARRIED WOMAN.

See TRUST.

1. The Orphans' Court, in distributing the estate of an intestate, may charge against the share of a married daughter the principal of a note given by her to the decedent for borrowed money, notwithstanding that the daughter was at its date legally incapacitated by her coverture from contracting a loan. *Bucknor's Estate*, 23.

2. The daughter, while not technically a bailee of the money for the estate, was bound in equity and good conscience to return it upon repudiating the note; and hence the Orphans' Court, as a court of equity, may treat it as virtually money of the estate in her possession, and make the distribution upon that basis. *Ibid.*, 23.

3. A married woman, in her dealings with the world, should be held to the observance of the same good faith to which others are bound; the pro-

tection against liability upon contracts which her coverture affords, is for the prevention of fraud, and she should not thereby be enabled, with impunity, to defraud others: Grim's App., 105 Pa. 382. *Ibid.*, 23.

4. As a disability imposed by law cannot be set aside or evaded by the acts of the party, a married woman can pass her title to real estate only in the statutory mode; wherefore, one claiming under a deed from a married woman and her husband that is lost, must show that it contained all the statutory requisites. *Logan v. Gardner*, 588.

5. The disabilities of infancy and coverture are separate and independent. The mere fact that they both occur in connection with the same act, does not give either any greater force than it would have had separately; accordingly, an infant feme-covert having properly executed a deed, the only objection to be met is that of infancy. *Ibid.*, 588.

6. The weight of authority now is that the deed of an infant is voidable only; that the title passes by it, and will remain in the grantee until some clear act of disaffirmance by the grantor after coming of age, and that such deed may be affirmed by acts much less formal than would be required to avoid it, and clearly by an estoppel. *Ibid.*, 588.

7. The dictum of Mr. Chief Justice GIBSON, in *Schrader v. Decker*, 9 Pa. 14, that the deed of an infant feme-covert is absolutely void, must be referred to the unsettled position of the law at that time; and the remark made in *Williams v. Baker*, 71 Pa. 476, that a ratification thereof must be by a re-acknowledgment after coming of age, is limited to ratification during coverture. *Ibid.*, 588.

8. The doctrine of estoppel in pais has been very much expanded, in modern times, particularly in Pennsylvania; and, while silence, in ignorance of one's own right, or of another's expenditure under a claim of right, will not estop, yet mere silence, with knowledge, is evidence from which a jury may find an estoppel, on the ground that the knowledge created a duty to speak. *Ibid.*, 588.

9. When a person under disability has made a deed which is voidable on account thereof, and after removal of the disability, the grantee, with the grantor's knowledge, made expenditures in placing improvements upon the land, it is not necessary to estop from a disaffirmance of the deed, that the grantor should have positively encouraged the improvements. *Ibid.*, 588.

MASTER AND SERVANT.

See NEGLIGENCE.

MORTGAGE.

1. An agreement made between a debtor and his creditor that the latter will acquire title to the lands of the debtor by means of a sheriff's sale, and will hold them with the right in the debtor to redeem, may constitute the transaction a mortgage unaffected by § 4, act of April 22, 1856, P. L. 533: *Harrison v. Soles*, 6 Pa. 393; *Rhines v. Baird*, 41 Pa. 256; *Saunders v. Gould*, 134 Pa. 445. *Guines v. Brockerhoff*, 175.

2. Such an agreement, if established by sufficient evidence, carried out according to its terms by advances on the part of the creditor and acts to

his injury on the part of the debtor on the faith thereof, is enforceable in equity against the creditor: *Sweetzer's App.*, 71 Pa. 264, followed: *Fox v. Heffner*, 1 W. & S. 372; *Jackman v. Ringland*, 4 W. & S. 149, and *Kimmel v. Smith*, 117 Pa. 183, distinguished. *Ibid.*, 175.

3. Grantees of the purchasing creditor, his widow and children, by a deed with but a nominal consideration, not describing the lands in dispute, and, by the testimony of one of the grantees, not intended to include them, have no better standing to contest the debtor's claim under the agreement than their grantor to whose rights they succeeded. *Ibid.*, 175.

4. A parol defeasance, sufficiently proved, being the equivalent of a written one, though a bill filed to enforce the debtor's rights averred that the agreement was in writing, but that established by the proofs was in parol, the variance was technical rather than substantial, and, if necessary, an amendment is permissible at any stage of the proceeding. *Ibid.*, 175.

MUNICIPAL CORPORATIONS.

See **BOROUGHES.**

See **SIDEWALKS.**

MUNICIPAL ORDINANCES.

See **BOROUGHES.**

1. So far as § 4, act of May 23, 1874, P. L. 231, relating to the government of cities, requires the mayor to return a vetoed ordinance to councils within ten days, it is mandatory; but the provision that it shall be returned to the branch of councils wherein it originated, is merely directory: *Per PAXSON, C. J. Commonwealth v. Fuller*, 129.

2. Under the practice prevailing in the city councils of Philadelphia, it seems that a bill introduced into the common councils, referred without consideration to a joint committee, reported by it to select council of which its chairman is a member, and first passed by that body, originates therein, within the meaning of said act. *Ibid.*, 129.

NEGLIGENCE.

See **BRIDGES.**

1. It is not of itself negligence, either on the part of the passenger or on the part of a street-railway company, that an adult, or a person reasonably competent to take care of himself, should occupy by permission a platform of a crowded passenger car: *West Phila. etc. Ry. Co. v. Gallagher*, 108 Pa. 524. *Sandford v. Railroad Co.*, 84.

2. The carrier, however, is bound to higher care and vigilance, when the platform is crowded, in proportion as that place is more dangerous than a seat inside the car; and, in case of injury, this fact, with all the circumstances, will be considered in determining the carrier's responsibility: *Crissey v. Railway Co.*, 75 Pa. 83. *Ibid.*, 84.

3. In the case of a passenger, obviously incompetent, from extreme youth or other cause, to exercise proper judgment or discretion for his own safety, it is the conductor's duty to exercise the highest degree of

vigilance for the passenger's safety consistent with the discharge of his ordinary duties: *Pittsb. etc. Ry. Co. v. Caldwell*, 74 Pa. 421; *Phila. etc. Ry. Co. v. Hassard*, 75 Pa. 367. *Ibid.*, 84.

4. Where a boy of eight years, without the knowledge of the conductor, pushed through a crowded car to the front platform, where he was found by the conductor, when taking up fares, and was immediately thereafter injured, without fault on the part of the company's employees, it was error to submit the question of defendant company's negligence to the jury. *Ibid.*, 84.

5. A servant cannot, by any act of his, impose upon his master a higher liability for negligence than the master is under to the servant himself; and one who assists such servant in his duties, at the servant's request only, can have no other or different remedy against the master, for negligence, than the servant had. *Wischam v. Rickards*, 109.

6. That the person assisting can have no higher rights than the servant in the performance of whose duties he joins has, is not so much because he is a volunteer, as because he makes himself one of a class, who, as against the master, have no right of recovery for the negligent acts or conduct of each other. *Ibid.*, 109.

7. Wherefore, as one who is engaged in the service of a common master, and in a common employment, cannot recover against the master for the negligence of a fellow-servant, whether paid for his service or not, so, if a stranger join at the request of a servant and is injured, he is in no better position than a mere volunteer. *Ibid.*, 109.

8. Nor, when one joins in a service and is injured therein by the negligence of a servant, is the master's liability increased by the fact that such assistance was rendered by the person injured, in obedience to an order of his own superior, made in response to a call proceeding from the servant to whom the assistance was given. *Ibid.*, 109.

9. The same rule will apply where the work, in the doing of which the injury is received, is one in which the master of the person injured, and the master to whose servant, in response to the servant's call, the assistance of the injured party is rendered, are jointly interested, and the servants of both are employed to accomplish it. *Ibid.*, 109.

10. *Potter v. Faulkner*, 1 B. & S. (101 E. C. L.) 800; *Flower v. Penna. R. Co.*, 69 Pa. 210; *Degg v. Railway Co.*, 1 H. & N. Exch. 773, followed: *Abraham v. Reynolds*, 5 H. & N. Exch. 143; and *Wright v. Railway Co.*, L. R. 1 Q. B. Div. 252, distinguished. *Ibid.*, 109.

11. From the fact that a particular method or appliance is dangerous, it does not follow that it is negligence for an employer to use it. Some employments are essentially hazardous; and the unbending test of negligence, in methods, machinery and appliances, is the ordinary usage of the business. *Titus v. Railroad Co.*, 618.

12. An employer performs his duty when he furnishes appliances of ordinary character and reasonable safety, and the former is the test of the latter. For, in regard to the style of the implement, or the nature of the mode of performance of a work, "reasonably safe" means safe, according to the usages, habits and ordinary risks of the business. *Ibid.*, 618.

(a) In an action for the death of a brakeman, the negligence charged

was the use of a particular broad-gauge car body upon a narrow-gauge truck, not adapted thereto. The carriage of broad-gauge cars upon narrow-gauge trucks, was a part of defendant's ordinary business, and cars like the one referred to had been carried quite often :

13. In the absence of proof that the carrying of this car, in the manner complained of, was an unusual occurrence on the road of defendant company, and the plaintiff's testimony showing that the brakeman accepted his employment with full knowledge of the practice of thus carrying such cars and the risks incident thereto, there could be no recovery for the injuries received. *Ibid.*, 618.

NOTICE TO PURCHASERS.

1. Though a judgment creditor is not a purchaser within the recording acts, a purchaser of land under his judgment has all the qualities of one, by relation, from the date of the lien, and his title is paramount to all conveyances and encumbrances subsequent thereto: *Woods v. Farmere*, 7 W. 382. *Lance v. Gorman*, 200.

2. Wherefore, it is incumbent on one who alleges a resulting trust in his favor, antedating the entry of the judgment under which the sheriff has sold the legal title to land, to show that the purchaser at the sheriff's sale had notice, actual or constructive, of the equitable title or resulting trust, at the time he bought. *Ibid.*, 200.

3. The possession of property, in person or by tenants, is notice of title in every form; but, when one who is in possession has placed on record a particular title, consistent with that possession, the registry thereof will restrict the generality of notice from possession, narrowing it to specific notice of that particular title. *Ibid.*, 200.

(a) Land paid for with money of a wife, was conveyed by mistake to her husband. After the entry of judgments against him, the husband and wife conveyed it to a third person, who then conveyed to the wife. These conveyances were dated and recorded the same day, and purported to be made for "\$100 and divers other good considerations."

(b) At a sheriff's sale of the land as the property of the husband, subsequently held under the judgments aforesaid, the wife gave written notice to bidders that the land was her sole and separate property, and that the sale would not pass title. Her tenants were in possession at and before the date of the sale :

4. The written notice being silent as to the fact that the wife's title antedated the judgments, and both that notice and the possession of the wife's tenants being consistent with and referable to the recorded deed to the wife, neither of them was sufficient to put purchasers on inquiry as to a prior equitable title. *Ibid.*, 200.

NOTICE OF SPECIAL MATTER.

In an action wherein the plaintiff seeks to recover damages for the breach of a contract, a notice of special matter, given by him in a former action between the parties, whereby as a defence thereto he set up the same breach of contract and claimed damages therefor much less in amount than he now claims, is admissible as a previous declaration made

by him on the subject of the extent of the injury complained of. *Limbert v. Jones*, 81.

NUISANCE, PRIVATE.

See SIDEWALKS.

OFFICIAL SURVEYS.

1. Where both parties in ejectment claim by lines and corners marked on the ground, the rule that an official survey duly made and returned, and unquestioned for more than twenty-one years, is conclusively presumed to have been actually made upon the ground as returned, is inapplicable. *Keller v. Over*, 1.

2. Such presumption, being raised only to supply the place of actual proofs, has no application to a case in which the existence of marks upon the ground, establishing where the official survey was actually made, is shown; in which case, the proper location of the tract is to be determined by the jury from such marks: *Grier v. Penna. Coal Co.*, 128 Pa. 79. *Ibid.*, 1.

3. Where there are no marks upon the ground exhibiting the actual location of one of the lines of an official survey duly returned, that line may be fixed by protraction from any known monument on any other known line, by means of the legal presumption that the lines were run upon the ground as returned. *Ibid.*, 1.

4. And when different marked lines are found on the ground, the fact that the official return of survey corresponds with a marked line contended for by one of the parties, is a circumstance proper for the consideration of the jury in determining which of the lines is the true location. *Ibid.*, 1.

5. But, upon the trial of such case, a charge which, while conceding that the marks upon the ground must control in deciding the question of location, directs the jury to apply, in their consideration of the evidence, the presumption that the official survey, being more than twenty-one years old, was made as returned, is misleading. *Ibid.*, 1.

6. A warrant with a survey thereon, duly returned and accepted, gives the warrantee a title to the land covered by it. A junior warrant located on the same land confers no title, for the commonwealth had none to grant. *Mining Co. v. Coal Co.*, 444.

(a) Tracts now owned by the plaintiff were returned into the land office as surveyed north of and adjoining older surveys now owned by the defendant, and the north line of the older tracts was described by its monuments, actually on the ground, as the south line of the younger.

(b) The deeds from the patentee down to the plaintiff followed the description given by the return of survey. Testimony was offered on the trial to show that, notwithstanding the official description and calls, the plaintiff's tracts were in fact located on top of the older warrants for which they called:

7. The evidence offered was irrelevant and immaterial for the following reasons: (1) It showed no title derived from the commonwealth, because her title passed under the first warrant and survey. (2) Moreover, it showed no title derived from the patentee of the first surveys; this because:

(c) Although the owner of both blocks, yet when he sold the surveys now owned by the plaintiff, he followed the official description of the younger surveys, in his deed, and bounded his grantees on the south by the north line of the older surveys, a well known marked line on the ground;

(d) He neither did nor said anything to mislead his vendees or induce them to think the land he sold them lay elsewhere than on the north of the older surveys; and (e) the north line of the older warrants was actually pointed out on the ground as the south line of the younger block to purchasers through whom the plaintiff claims. *Ibid.*, 444.

8. The vendee, on discovering that he had purchased several tracts having no actual existence, might proceed against the vendor on his covenant or rescind the contract in toto, but could not go over the recognized lines of his purchase and appropriate a corresponding amount of his vendor's adjoining land. *Ibid.*, 444.

9. The delivery of a patent for a tract of land by the commonwealth is an admission that all previous formalities and requisites have been complied with, and passes the title to the grantee. The patent is therefore evidence, *prima facie*, of a survey and return in accordance with the description contained in it. *Bushey v. Iron Co.*, 541.

10. A plaintiff having shown an application for land, a warrant issued thereon, and a patent to his grantor for the land described in the warrant, has a *prima facie* case on which he may rest, without showing the return of the survey, made under the warrant, into the land office. *Ibid.*, 541.

11. The rule that, after the lapse of twenty-one years, the law presumes that a survey regularly returned was made as returned, cannot locate a survey until some monument of it can be found on the ground. Whether such marks exist is a question of fact. If one or more such marks be found, the law will locate the survey by the aid of the presumption. *Ibid.*, 541.

12. If the monuments called for are the lines of older tracts as adjoiners, such older tracts must be located, before the legal presumption can be invoked; but as soon as one or more of the tracts called for is located, the presumption can be resorted to to close the survey. *Ibid.*, 541.

13. If the survey calls for marks or other monuments upon its own lines or at its corners, and for adjoiners, and the marks when found are inconsistent with the calls for adjoiners, the marks must prevail, as they are the official foot-prints of the surveyor on the ground: *Grier v. Coal Co.*, 128 Pa. 74; *Bloom v. Ferguson*, 128 Pa. 362. *Ibid.*, 541.

OIL- AND GAS-LEASE.

1. The lessees of land, demised to them for the production of oil alone, who obtain gas but not oil, and are thereupon dispossessed by ejectment brought upon a forfeiture alleged, have no equity to be reimbursed the expenses of their operations out of the proceeds of the gas obtained. *Palmer v. Truby*, 556.

2. Under a lease which grants to the lessee for oil producing purposes a certain described tract of land, with the exclusive right of boring for oil thereon, but restricts the operations of the lessee to certain specified sites

the lessee has no right of possession, such as will support ejectment, as to any land outside the designated sites: *Duffield v. Hue*, 129 Pa. 94. *Duffield v. Hue*, 602.

3. The lessee, however, has the protection of the entire premises, and equity has jurisdiction to restrain the lessor, or others acting under him, from drilling wells thereon outside of such designated sites, and thereby lessening the production of wells drilled by the lessee, such injury being destructive of his rights and incapable of adequate remedy at law. *Ibid.*, 602.

4. A court of equity may entertain a bill for an injunction against such an interference with the lessee's rights, notwithstanding that the boundaries of the demised premises are disputed, the defendant, who also is in possession under the lessor, denying that the land upon which he is drilling was included by the lessor in the leasehold granted to the plaintiff. *Ibid.*, 602.

5. The lessor of an oil lease being dead, in a controversy between one who had succeeded to his title and an assignee of the lessee, as to whether the leasehold estate had been forfeited, the lessee and his assignee were incompetent, both before and after the passage of the act of May 23, 1887, P. L. 158, to testify to a waiver of forfeiture by the lessor. *Ibid.*, 602.

ORDINANCES.

See CITIES.

ORPHANS' COURT.

See LIMITATION OF ACTIONS.

1. The Orphans' Court, in distributing the estate of an intestate, may charge against the share of a married daughter the principal of a note given by her to the decedent for borrowed money, notwithstanding that the daughter was at its date legally incapacitated by her coverture from contracting a loan. *Bucknor's Estate*, 23.

2. The daughter, while not technically a bailee of the money for the estate, was bound in equity and good conscience to return it upon repudiating the note; and hence the Orphans' Court, as a court of equity, may treat it as virtually money of the estate in her possession, and make the distribution upon that basis. *Ibid.*, 23.

3. A married woman, in her dealings with the world, should be held to the observance of the same good faith to which others are bound; the protection against liability upon contracts which her coverture affords, is for the prevention of fraud, and she should not thereby be enabled, with impunity, to defraud others: *Grim's App.*, 105 Pa. 382. *Ibid.*, 23.

4. When an executor's account has been confirmed and the money paid out under a decree of distribution, it is too late to have the account reviewed for the purpose of following the money in the hands of the distributees; and the decision in *Keim's App.*, 125 Pa. 480, might well have been rested on this ground alone. *High's Estate*, 222.

(a) One to whom real estate had been devised for life with remainder to his children, but who never had any children, sold the land, as trustee, in pursuance of a decree under the act of April 18, 1853, P. L. 503. After

his death. his executrix settled an account, charging herself with the principal arising from said sale as due to the estate of the devisor :

5. Such account having been confirmed, and said fund awarded by the Orphans' Court to the administrator de bonis non, etc., of the devisor, the executrix had no standing, at the audit of the administrator's account, to claim the fund back, on the ground that the sale under the act of 1853 enlarged the life-tenant's estate to a fee. *Ibid.* 222.

6. As a general rule, no one can claim upon a distribution in the Orphans' Court except through the decedent, as creditor, heir or legatee; and the exceptions to this rule, established by such cases as *Marshall v. Hoff*, 1 W. 440, and *Miller's App.*, 84 Pa. 391, cannot apply when the fund has been judicially ascertained to belong to the decedent's estate. *Ibid.*, 222.

7. The Orphans' Court has no jurisdiction to determine the existence of a partnership between a decedent and another, to take cognizance of partnership transactions, and to state an account between the surviving partner and the personal representatives of the deceased: *Wiley's App.*, 84 Pa. 270; *Ainey's App.*, 11 W. N. 568 (2 Penny. 192), followed; *Brown's App.*, 89 Pa. 139, distinguished. *Miller's Estate*, 349.

PAROL DEFEASANCE.

See MORTGAGE.

PARTITION.

1. Under § 3, act of March 17, 1845, P. L. 160, and § 1, act of February 14, 1857, P. L. 39, the Courts of Common Pleas throughout the state have ample power to make partition by proceedings in equity, in all cases where the title of the plaintiff is clear. *Sheridan v. Sheridan*, 14.

2. The reason why a testamentary direction to sell real estate works a constructive conversion, is that an actual conversion is thereby made certain; and the estate is treated as having at once the qualities which it must necessarily have when the power of sale is executed. *Ibid.*, 14.

3. Hence, when a will contains no positive direction to sell, but merely gives the executors a naked power of sale, to be used "if they find it necessary to do so in order to make a fair and equitable division" of the estate in accordance with the will, to work a conversion an actual sale is necessary. *Ibid.*, 14.

(a) By her will a testatrix divided her estate into four shares bequeathing and devising one share to each of her three children for life, with a limitation over of said three shares and a gift of the fourth share to her grandchildren, to come into their possession at majority, respectively, and until then to be held in trust:

4. In such case, as each grandchild became of full age, the trust terminated as to him, and he became seised of such an interest in the real estate of the testatrix as enabled him to maintain a bill for a partition, notwithstanding an unexercised naked power to sell for purposes of division. *Ibid.*, 14.

5. Under § 10, act of April 22, 1856, P. L. 534, when any of the parties in a partition proceeding desires to make a bid for the land, above the valuation, all the bids must be submitted in writing before any of them

is announced, and the land is to be awarded forthwith to the party who offers the highest price above the valuation. *Eyerman v. Detwiller*, 285.

6. The act of 1856 does not repeal § 37, act of March 29, 1832, P. L. 201, nor § 14, act of May 5, 1841, P. L. 353, directing what preferences shall be given in the allotment of land at the appraised value in cases of partition, but restricts their operation to cases in which all the parties decline to offer a price above the valuation. *Ibid.*, 285.

7. When two or more parties desire to submit a joint bid, they may do so, and if their bid is the highest, the land, or the purpart thereof so bid for, should be awarded to them jointly: the proper practice, under the act of 1856, in receiving bids and allotting purparts, stated: Per Mr. Justice STERRETT. *Ibid.*, 285.

PARTNERSHIP.

See JOINT-STOCK COMPANY.

1. The Orphans' Court has no jurisdiction to determine the existence of a partnership between a decedent and another, to take cognizance of partnership transactions, and to state an account between the surviving partner and the personal representatives of the deceased: Wiley's App., 84 Pa. 270; Ainey's App., 11 W. N. 568 (2 Penny. 192), followed; Brown's App., 89 Pa. 139, distinguished. *Miller's Estate*, 349.

2. In a suit by a partnership, the names of the partners should be stated on the record as descriptive, and to enable the court to take care of rights growing out of cross-demands, etc.; but the partnership is a distinct person in law, capable of holding property, contracting, suing and being sued, and the cause of action asserted must belong to the firm as such. *Clarke v. Railroad Co.*, 408.

3. As a majority of the partners, while acting fairly and in good faith, and keeping within the scope and purposes of the partnership, have power to direct the course of the partnership affairs, they may give a valid warrant of attorney in the name of the firm, authorizing a suit upon a contract made by it, and this notwithstanding the dissent of a minority. *Ibid.*, 408.

4. Ordinarily, it would be error, after the filing of such a warrant, to make absolute a rule for a sufficient warrant, and to stay the suit; but if it appear that the parties who gave the warrant have been divested of all interest in the firm, and that what was submitted by the parties and decided by the court was the effect of the divesting acts, such order was harmless and will not be disturbed. *Ibid.*, 408.

PARTY WALL.

1. A wall between two buildings of adjoining owners, used as a common wall continuously for a period of more than twenty-one years, becomes a party wall to the properties, whether equally upon the lot of each, or wholly upon the lot of one owner. *McVey v. Durkin*, 418.

2. Where such a wall, condemned by the Philadelphia building inspectors, under the act of May 20, 1857, P. L. 590, has been removed and another erected in its place and approved by the inspectors, the owner removing and rebuilding is not liable in trespass therefor. *Ibid.*, 418.

PATENT FOR LANDS.

See TITLE TO LANDS.

PAYMENT, UNDER PROTEST.

See VOLUNTARY PAYMENT.

PERPETUITIES.

See POWERS.

POWERS.

1. When the donee of a power to appoint, by will, real estate situated in Pennsylvania, dies domiciled in another state, leaving a will containing an appointment of such realty, which is probated in the forum of the domicile, the validity of the appointment so made, as an execution of the power, is to be determined by the law of Pennsylvania. *Lawrence's Estate*, 354.

2. The rule against perpetuities, to wit, that no interest, subject to a condition precedent, is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest, is unmodified by statute, except as § 9, act of April 18, 1853, P. L. 507, and § 12, act of April 26, 1855, P. L. 382, operate in restraint of accumulations. *Ibid.*, 354.

3. When a power of appointment is given, either by deed or will, the rule applies as well to the power as to the appointment; and, if made exercisable at a time beyond the limits of the rule, the power is bad: but, when it must be exercised, if at all, within the legal limit, it will not be rendered void by the fact that, within its terms, an appointment might possibly be made which would be too remote. *Ibid.*, 354.

4. Except when the donee of the power has absolute control, so that he can appoint to himself, or to any other person to take in his lifetime, and therefore is practically the owner, the remoteness of the estate appointed must be measured from the time of the creation of the power, and no estate can be limited thereunder which would have been too remote if limited in the instrument creating the power. *Ibid.*, 354.

5. When the donee of a power to devise, who was in being at the creation of the power, appoints by will, in trust for life-tenants to take at his death, with remainder over, such appointment for life will be good, whether the appointees for life were born before or after the creation of the power, and even if the estate appointed in remainder be too remote: *Smith's App.*, 88 Pa. 492, overruled in part. *Ibid.*, 354.

6. If the estate in remainder, appointed by such donee, is vested at his death, its enjoyment merely being postponed until the determination of a preceding vested estate for life, the rule against remoteness, which has regard to the time when the estate vests so as to be disposable by the grantee or devisee, is satisfied: *Smith's App.*, 88 Pa. 492, doubted but distinguished. *Ibid.*, 354.

7. Under a general power of appointment, authorizing the donee to "grant and convey the real estate in fee in such parts or shares"

as he may by his will direct, but giving no express authority to declare trusts, the donee may appoint the fee to trustees for the benefit of certain persons for life, with remainder over in fee, observing in such appointment the rule against remoteness. *Ibid.*, 354.

PRACTICE.

See MANDAMUS.

See PARTITION.

In election cases, see ELECTIONS.

In equity, see EQUITY, JURISDICTION, PRACTICE.

In Orphans' Court, see ORPHANS' COURT.

In Supreme Court, see SUPREME COURT.

1. Whether to a declaration charging false imprisonment and assault and battery, an amended statement of claim may be filed, under the act of May 25, 1887, P. L. 271, charging, additionally, that the defendants falsely and maliciously and without probable cause directed and procured the arrest of the plaintiff, not considered. *Sloan v. Schomaker*, 382.

2. In a suit by a partnership, the names of the partners should be stated on the record as descriptive, and to enable the court to take care of rights growing out of cross-demands, etc.; but the partnership is a distinct person in law, capable of holding property, contracting, suing and being sued, and the cause of action asserted must belong to the firm as such. *Clarke v. Railroad Co.*, 408.

3. As a majority of the partners, while acting fairly and in good faith, and keeping within the scope and purposes of the partnership, have power to direct the course of the partnership affairs, they may give a valid warrant of attorney in the name of the firm, authorizing a suit upon a contract made by it, and this notwithstanding the dissent of a minority. *Ibid.*, 408.

4. Ordinarily, it would be error, after the filing of such a warrant, to make absolute a rule for a sufficient warrant, and to stay the suit; but if it appear that the parties who gave the warrant have been divested of all interest in the firm, and that what was submitted by the parties and decided by the court was the effect of the divesting acts, such order was harmless and will not be disturbed. *Ibid.*, 408.

5. Where a receiver, appointed by the court on the application of the parties, pending an ejectment to recover lands demised for oil production, pays out money upon the order of the court, in good faith, he will be protected, even though the order was made improvidently. *Palmer v. Truby*, 556.

6. If, however, the decree was obtained by mistake or fraud and the money paid out thereon to one of the parties, the court, even after such payment, has power to rescind the decree and require the payees to restore the money to the custody of the court or of its officer. *Ibid.*, 556.

7. But, if the decree was made in the presence and with the knowledge and assent of the attorneys representing both parties, an order upon the payees for re-payment will not be made, unless the petitioners present a

strong equity and show that they will sustain an irreparable injury, if it be not made. *Ibid.*, 556.

PRESUMPTIONS.

See OFFICIAL SURVEYS.

Where a conveyance is made to two persons as grantees, there is a presumption, in the absence of an express agreement otherwise, that each one takes an undivided moiety of the property; and, in such case, if either grantee has furnished more than one half the purchase money, the other is indebted to him in an amount necessary to equalize their respective investments. *Kieffer's Estate*, 535.

PUBLIC POLICY.

See AGENT.

PURCHASERS OF LAND.

See NOTICE TO PURCHASERS.

RAILROADS.

1. When either of the words, railroad or railway, is used in a statutory or constitutional provision, and the context is without indication that a particular kind of road is intended, the provision will be held applicable to every species of road embraced in the general sense of the word used: *Hestonville etc. R. Co. v. Philadelphia*, 89 Pa. 210. *Gyger v. Railroad Co.*, 96.

2. But, though the words, railroad and railway, are thus synonymous, yet, when either one or the other of them is used in a provision, and it is evident from the context that a particular kind of road is intended, that kind of road only will be held to be the subject-matter of the enactment. *Ibid.*, 96.

3. Section 4, article XVII. of the constitution, providing that "no railroad, canal, or other corporation . . . shall consolidate . . . with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning . . . a parallel or competing line," is not applicable to street-railway companies. *Ibid.*, 96.

4. The passenger travel over parallel streets of cities is not necessarily a competing travel, and it is quite clear, therefore, that the sense of "competing," which is the essential sense of the prohibition of the section, is not applicable to the travel upon the streets of cities and towns over street-passenger railways. *Ibid.*, 96.

RECEIVERS.

1. Where a receiver, appointed by the court on the application of the parties, pending an ejectment to recover lands demised for oil production, pays out money upon the order of the court, in good faith, he will be protected, even though the order was made improvidently. *Pulmer v. Truby*, 556.

2. If, however, the decree was obtained by mistake or fraud and the

money paid out thereon to one of the parties, the court, even after such payment, has power to rescind the decree and require the payees to restore the money to the custody of the court or of its officer. *Ibid.*, 556.

3. But, if the decree was made in the presence and with the knowledge and assent of the attorneys representing both parties, an order upon the payees for re-payment will not be made, unless the petitioners present a strong equity and show that they will sustain an irreparable injury, if it be not made. *Ibid.*, 556.

RES JUDICATA.

See DISTRIBUTION.

See ORPHANS' COURT.

RESULTING TRUST.

See NOTICE TO PURCHASERS.

RIPARIAN OWNERS.

(a) Cade and Miller, owning respectively adjoining lands on a stream, made an agreement, in settlement of an action by Cade against Miller for diverting water from one channel to the other, which provided that Cade, his heirs and assigns, should enjoy a "water right or power" for two wheels on any part of his land, and Miller, his heirs and assigns, should enjoy water for his mill only when there was a surplus:

1. The superior right, recognized in the agreement as being in Cade was a right as a riparian owner; therefore, as the covenants in the agreement related to the lands of the respective parties, and were to be performed thereon and in connection with the use and enjoyment thereof, they ran with the land and regulated the mutual rights of the heirs and assigns of the parties, respectively. *Horn v. Miller*, 640.

2. While privity of estate is ordinarily necessary to a covenant running with the land to which it relates, justice will require that the right to enjoy such contracts should extend to all who have a beneficial interest in their fulfilment; and, when the benefit and the burden of covenants securing mutual rights are so inseparably connected that each is necessary to the existence of the other, both must go together. *Ibid.*, 640.

3. When the land of one of the parties to such an agreement as the above has been conveyed by him, it is of no consequence that the deed may make no mention of the agreement or of the rights accruing therefrom; the right of such party as a riparian owner, recognized and defined by the agreement, will pass as appurtenant to the land, and it is unnecessary to mention it in the deed. *Ibid.*, 640.

4. The assignee of a part only of such land, who is the owner of the only mill-seat on the original tract, may sue for a diversion of water made by the successor of the party who covenanted with his assignor; that mills may be built on other parts of the land, which will use the water after it leaves his mill, cannot affect the servient tenement, or, if it would, the apprehension thereof will not justify such diversion. *Ibid.*, 640.

5. When landowners have entered into covenants, defining and securing their respective rights in the use of the water of a stream, their agreement is equivalent to a grant; and, as in other cases of grants of easements, the proper remedy of one party for a disturbance of his right by the other party, or those claiming under him, is by action of trespass and not by action of covenant. *Ibid.*, 640.

ROADS.

See HIGHWAYS.

See STREETS.

RULE IN SHELLEY'S CASE.

See TRUST.

SALES.

Of realty, see VENDOR AND PURCHASER.

Of timber, see TIMBER.

SEPARATE USE.

See TRUST.

SHELLEY'S CASE, RULE IN.

See TRUST.

SHERIFF'S SALE.

See NOTICE TO PURCHASERS.

1. An agreement made between a debtor and his creditor that the latter will acquire title to the lands of the debtor by means of a sheriff's sale, and will hold them with the right in the debtor to redeem, may constitute the transaction a mortgage unaffected by § 4, act of April 22, 1856, P. L. 533: *Harrison v. Soles*, 6 Pa. 393; *Rhines v. Baird*, 41 Pa. 256; *Saunders v. Gould*, 134 Pa. 445. *Gaines v. Brockerhoff*, 175.

2. Such an agreement, if established by sufficient evidence, carried out according to its terms by advances on the part of the creditor and acts to his injury on the part of the debtor on the faith thereof, is enforceable in equity against the creditor: *Sweetzer's App.*, 71 Pa. 264, followed; *Fox v. Heffner*, 1 W. & S. 372; *Jackman v. Ringland*, 4 W. & S. 149, and *Kimmel v. Smith*, 117 Pa. 183, distinguished. *Ibid.*, 175.

3. Grantees of the purchasing creditor, his widow and children, by a deed with but a nominal consideration, not describing the lands in dispute, and, by the testimony of one of the grantees, not intended to include them, have no better standing to contest the debtor's claim under the agreement than their grantor to whose rights they succeeded. *Ibid.*, 175.

SIDEWALKS.

1. The foot ways, no less than the carriage ways, in cities and boroughs, are under municipal control; and the authorities may determine the extent

to which the sidewalks may be obstructed by cellar doors, doorsteps, awnings, bay-windows, cornices and the like. *Livingston v. Wolf*, 519.

2. This power must be exercised under regulations that are general and uniform, that are reasonable and certain, and that are in conformity with the constitution and the laws: *Paul v. Carver*, 26 Pa. 223; *Kneedler v. Norristown*, 100 Pa. 368; *Reimer's App.*, 100 Pa. 182. *Ibid.*, 519.

3. Under regulations that are reasonable in character and general in their application, cities and boroughs have power to permit the use of portions of the highways for approaches to and for ornamental work upon buildings standing on the street line. *Ibid.*, 519.

4. A borough ordinance authorizing the use of 3 feet 6 inches of the foot way for cellar entrances, and prohibiting bay-windows projecting more than 28 inches, on a street 60 feet wide, is not unreasonable; and under it an over-hanging balcony and bay-window projecting less than those limits will not be enjoined. *Ibid.*, 519.

5. If the conclusion in this case could be regarded as doubtful, the decree dismissing the bill of an adjoining owner for an injunction, would nevertheless be affirmed upon the finding of the master that the structures complained of caused no appreciable injury to the plaintiff. *Ibid.*, 519.

SPECIAL MATTER.

See NOTICE OF SPECIAL MATTER.

SPECIFICATIONS OF ERROR.

See SUPREME COURT.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTORY LAW.

(a) The act of April 13, 1843, P. L. 221, imposes upon the commissioners of the counties of the commonwealth the duty of keeping county bridges in repair. That act, as to Huntingdon county, was repealed by the act of March 11, 1844, P. L. 86. By the act of February 26, 1846, P. L. 64, Blair county was erected out of parts of Huntingdon and Bedford counties:

1. By the act creating Blair county, providing that the officers of said county should be subject to "the same duties as other similar officers" in the other counties of the state, it became the duty of the county commissioners, under the general law, to keep in repair county bridges erected prior to 1846, in territory taken from Huntingdon county. *Shadler v. Blair Co.*, 488.

STREETS.

1. Dedication of land to public use as a highway is a question of intention. When the intention to dedicate exists, and the way is used by the public, the dedication will become effective without reference to the length of time covered by such user; but, when there is no such intention,

the user will not work a dedication, however long continued. *Weiss v. South Bethlehem Bor.*, 294.

2. A mere permissive use by the public, as a street, of a piece of ground left open by the owner in front of his property, and concurrently used by himself in his own business and for his own convenience, will not work a dedication to public use, nor will it confer upon the public any right as against the owner. *Ibid.*, 294.

3. An owner may make a limited dedication in favor of the public, resumable at his mere pleasure, or may suffer a permissive use by the public for all purposes of passage, jointly with himself, without in any degree impairing his right to terminate such privilege at any time: *Gowen v. Phila. Exchange Co.*, 5 W. & S. 142; *Griffin's App.*, 109 Pa. 150. *Ibid.*, 294.

4. When there is no other evidence of dedication than the mere fact of public user, so that the right claimed by the public is purely prescriptive, it is essential, to maintain it, that the user or enjoyment should be adverse, uninterrupted and exclusive for twenty-one years: *Commonwealth v. Cole*, 26 Pa. 187, distinguished. *Ibid.*, 294.

5. It is not error to instruct a jury that the facts that a strip of ground has been used by the public as a street continuously for twenty-one years, that it leads from one avenue to another and is the natural route to and from several manufactories, and that a building line has been maintained by property owners along it, are "some evidence" of dedication, but not conclusive. *Ibid.*, 294.

6. In assessing damages for the laying out of a public street, in front of a manufacturing establishment and between it and a railroad, the jury may consider whether the loss of the right of the owners to lay a private siding upon the site of the street, control its use, and keep cars standing thereon at their pleasure, will affect the market value of the property. *Ibid.*, 294.

7. In assessing damages for the laying out of a borough street, interest from the date of the taking should be awarded to the owner as a part of his damages; the provision in § 27, act of April 3, 1851, P. L. 320, amended by § 2, act of May 22, 1883, P. L. 39, that interest shall be allowed "from the date of the adjudication," relating only to the subject of interest upon the award when made. *Ibid.*, 294.

STREET-RAILWAY COMPANIES.

1. When either of the words, railroad or railway, is used in a statutory or constitutional provision, and the context is without indication that a particular kind of road is intended, the provision will be held applicable to every species of road embraced in the general sense of the word used: *Hestonville etc. R. Co. v. Philadelphia*, 89 Pa. 210. *Gyger v. Railroad Co.*, 96.

2. But, though the words, railroad and railway, are thus synonymous, yet, when either one or the other of them is used in a provision, and it is evident from the context that a particular kind of road is intended, that kind of road only will be held to be the subject-matter of the enactment. *Ibid.*, 96.

8. Section 4, article XVII. of the constitution, providing that "no railroad, canal or other corporation shall consolidate with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning a parallel or competing line," is not applicable to street-railway companies. *Ibid.*, 96.

4. The passenger travel over parallel streets of cities is not necessarily a competing travel, and it is quite clear, therefore, that the sense of "competing," which is the essential sense of the prohibition of the section, is not applicable to the travel upon the streets of cities and towns over street-passenger railways. *Ibid.*, 96.

SUPREME COURT.

1. An assignment of error to the admission of testimony, which does not give the offer made, nor the substance of the testimony admitted under it, and does not show any exception sealed, although it quotes the objections made to the admission of the testimony, is not according to the Rule of the Supreme Court, and will not be considered. *Burson v. Fire Association*, 267.

2. A judgment at law must sustain itself as a whole, and the reasons stated in the opinion of the judge are technically no part of the case; but in equity, especially when a claim has been dismissed without prejudice, the opinion of the chancellor is an integral part of the proceedings, and must be looked at to gather the exact tenor and extent of the decision. *Miller's Estate*, 349.

SURVEY.

See OFFICIAL SURVEY.

TENANTS IN COMMON.

See TIMBER.

Where a conveyance is made to two persons as grantees, there is a presumption, in the absence of an express agreement otherwise, that each one takes an undivided moiety of the property; and, in such case, if either grantee has furnished more than one half the purchase money, the other is indebted to him in an amount necessary to equalize their respective investments. *Kieffer's Estate*, 535.

TITLE TO LANDS.

See EJECTMENT.

See NOTICE TO PURCHASERS.

1. The delivery of a patent for a tract of land by the commonwealth is an admission that all previous formalities and requisites have been complied with, and passes the title to the grantee. The patent is therefore evidence, *prima facie*, of a survey and return in accordance with the description contained in it. *Bushey v. Iron Co.*, 541.

2. A plaintiff having shown an application for land, a warrant issued thereon, and a patent to his grantor for the land described in the warrant, has a *prima facie* case on which he may rest without showing the return of the survey, made under the warrant, into the land office. *Ibid.*, 541.

3. The rule that, after the lapse of twenty-one years, the law presumes that a survey regularly returned was made as returned, cannot locate a survey until some monument of it can be found on the ground. Whether such marks exist is a question of fact. If one or more such marks be found, the law will locate the survey by the aid of the presumption. *Ibid.*, 541.

4. If the monuments called for are the lines of older tracts as adjoiners, such older tracts must be located, before the legal presumption can be invoked; but as soon as one or more of the tracts called for is located, the presumption can be resorted to to close the survey. *Ibid.*, 541.

5. If the survey call for marks or other monuments upon its own lines or at its corners, and for adjoiners, and the marks when found are inconsistent with the calls for adjoiners, the marks must prevail, as they are the official foot-prints of the surveyor on the ground: *Grier v. Coal Co.*, 128 Pa. 74; *Bloom v. Ferguson*, 128 Pa. 362. *Ibid.*, 541.

TIMBER.

(a) A contract made in 1850, provided for the sale by the vendor "of all the pine, norway, and oak timber, suitable for sawing, and down to twelve inches in diameter at the smallest end of the log, on his tract of timber land," to be paid for by the thousand feet or by the acre, at the election of the purchasers;

(b) "But in either case they are to take said timber clean as they go, including all fit for sawing and down to twelve inches in diameter at the smallest end of the log: . . . the timber to be taken off clean; that is, all good merchantable timber down to twelve inches at the smallest end of the log."

(c) "And also, whether they take by the thousand or by the acre, to cut the timber clean as they go; that is, when they commence cutting upon any one hundred acres they will take the timber off from that part, . . . to prevent them from running over the whole tract and cutting out the best timber, or the best groves of timber, and leave the balance scattered over the tract:"

1. The words "down to twelve inches in diameter at the smallest end of the log," in their connection, did not create a reservation of timber to be left standing, or an exception of certain sizes out of the general grant of all the timber, but were parenthetical and explanatory of the duty of the purchasers to the vendor. *Dexter v. Lathrop*, 565.

2. Said contract, therefore, construed in the light of the period when it was made and of its application to the timber on a very large tract, required the purchasers to cut and remove all good merchantable timber, "including all fit for sawing," to be determined when the trees were reached in the process of removal, down to twelve inches in diameter. *Ibid.*, 565.

3. Under said contract, the vendor and purchasers did not sustain to each other the relation of tenants in common, but each was a sole tenant of his own estate, the one in the land, the other in the timber: *Wheeler v. Carpenter*, 107 Pa. 271, and *Shiffer v. Broadhead*, 126 Pa. 260, explained and distinguished. *Ibid.*, 565.

TRESPASS.

See FALSE IMPRISONMENT.

1. A wall between two buildings of adjoining owners, used as a common wall continuously for a period of more than twenty-one years, becomes a party wall to the properties, whether equally upon the lot of each, or wholly upon the lot of one owner. *McVey v. Durkin*, 418.

2. Where such a wall, condemned by the Philadelphia building inspectors, under the act of May 20, 1857, P. L. 590, has been removed, and another erected in its place and approved by the inspectors, the owner removing and rebuilding is not liable in trespass therefor. *Ibid.*, 418.

TRESPASS QUARE CLAUSUM FREGIT.

See TITLE TO LANDS.

TRUST.

See NOTICE TO PURCHASERS.

See WILL.

1. A trust merely for coverture will fail if there is no marriage, in fact or in contemplation, to support it, or, if the cestui que trust becomes discover by the death of her husband; and the circumstance that the trust imposes active duties upon the trustee will not prevent that result. *Kuntzleman's Estate*, 142.

2. But, when an active trust is created to give effect to a well defined, lawful purpose of a testator, in relation to his family, such as the preservation of the corpus of the estate for the benefit of the remainder-men who are to take by purchase, it will be sustained, whether the cestui que trust be sui juris or not. *Ibid.*, 142.

3. To bring a devise within the Rule in Shelley's Case, the limitation in remainder must be to the heirs, in fee or in tail, as a nomen collectivum for the whole line of inheritable blood; wherefore, the rule does not apply to a devise of income to a daughter for life, with a limitation over to her heirs, exclusive of her husband and mother. *Ibid.*, 142.

4. Perhaps under Yarnall's App., 70 Pa. 336, if the testator's intention was to create a separate use for the life-tenant, the exclusion of the husband alone would not have the effect of narrowing the line of descent; but the exclusion of the mother undoubtedly does so, and, accordingly, under such a limitation the remainder-men will take as purchasers. *Ibid.*, 142.

5. Wherefore, when one of the purposes of a testamentary trust, with active duties in the trustee, is to preserve the corpus of the estate for the remainder-men taking under such a limitation, the trust will be upheld, even though the husband and mother of the cestui que trust have died since the death of the testator. *Ibid.*, 142.

(a) A testator directed that the income of property devised to a trustee for the benefit of his sons, should be paid to them during life "free from their debts," etc., and that the income of a trust devise for his daughter should be paid to her, during life, for her sole and separate use, upon her separate receipt, without the control or interference of any husband:

6. Although the use of the words "free from debts," etc., is perhaps not essential to create a spendthrift trust, their omission, in the case of the daughter, was significant of the testator's intention with respect to her, and the trust for her benefit could not be sustained as a spendthrift trust. *Ibid.*, 142.

TRUSTEES.

1. A residuary legatee, the wife of one of the executors of the testator, in the absence of fraud, may purchase, through the medium of her husband, acting as her agent, the share of another residuary legatee; and, in such circumstances, the rule which prohibits a trustee from buying at his own sale has no application. *Dundas's Estate*, 318.

2. When a residuary legatee sold and conveyed his interest to the wife of one of the executors, at a price ascertained by an estimate made for the purpose by the executors, the fact that, through errors in and omission of data from such estimate, the price was fixed at much less than the share was really worth, will not necessarily invalidate the sale. *Ibid.*, 318.

3. If such errors and omissions were unintentional and honest mistakes, naturally arising from the peculiar state of the assets, and the sale was not tainted by any fraud, it will not be set aside, although the purchaser was represented in the transaction by her husband, and the seller relied entirely upon the statements of the executors. *Ibid.*, 318.

4. At all events, even if such sale were voidable at the election of the seller, he must act with reasonable promptness in moving to have it set aside; and a delay in so moving for two years after the purchaser, learning of his dissatisfaction, offered to re-convey upon repayment of the price, with interest, is such laches as works an estoppel. *Ibid.*, 318.

VENDOR AND PURCHASER.

See EJECTMENT.

VESTED, OR CONTINGENT?

See WILL.

VOLUNTARY PAYMENT.

(a) A stockholder of a corporation being about to make a written protest against the exaction from him of a bonus upon a subscription to a new issue of stock, the company's president requested him not to write it, agreeing that, under his verbal protest, he should have whatever benefit any one should receive, under a written protest, by any suit:

1. The effect of the president's agreement was simply a waiver of a written protest, putting the stockholder in the same position he would have occupied if he had written out his protest in a formal manner; it was not an engagement that the stockholder might recover back the bonus paid by him if any one else should obtain such a recovery. *De la Cuesta v. Insurance Co.*, 62.

2. Money voluntarily paid cannot be recovered back simply because the payment was made under protest. The only effect of a protest is to show the involuntary character of a payment procured by duress, and the intent

to claim the money back: Cunningham's App., 108 Pa. 546, explained and distinguished. *Ibid.*, 62.

3. The coercion which will render a payment under protest involuntary, so that it may be recovered back, must consist of duress either of person or of goods. A mere denial of an incorporeal right, by which a man is placed in a "dilemma" and compelled to choose between conflicting views of the law, is not sufficient for that purpose. *Ibid.*, 62.

4. A stockholder, who has the right, under the law, to subscribe at par for a proportionate part of a new issue of stock, has an adequate remedy in damages for a refusal by the corporation to recognize that right; and a threat to sell such stock to others, unless he agree to pay more than par for it, will not constitute legal duress: Motz v. Mitchell, 91 Pa. 114, distinguished. *Ibid.*, 62.

VOTERS, QUALIFICATIONS.

See ELECTIONS.

WARRANT OF ATTORNEY.

See ATTORNEY-AT-LAW.

WATER POWER.

See RIPARIAN OWNERS.

WIDOW, ELECTION AGAINST WILL.

See WILL.

WILL.

See CONVERSION.

See LEGACY.

See POWERS.

(a) By her will a testatrix divided her estate into four shares bequeathing and devising one share to each of her three children for life, with a limitation over of said three shares and a gift of the fourth share to her grandchildren, to come into their possession at majority, respectively, and until then to be held in trust:

1. In such case, as each grandchild became of full age, the trust terminated as to him, and he became seised of such an interest in the real estate of the testatrix as enabled him to maintain a bill for a partition, notwithstanding an unexercised naked power to sell for purposes of division *Sheridan v. Sheridan*, 14.

(a) The will of a testator devised all his estate to his wife in fee, and appointed her his executrix with full power to sell and convey. Children were born after the date of the will, and for them no provision was made therein.

(b) By a deed reciting the devise to her in fee, but not indicating that she conveyed or intended to convey under the power, or that the deed was made in the course of the administration of the estate, the widow afterward conveyed the real estate devised to her:

2. In such case, the provisions of § 1, act of June 4, 1879, P. L. 88, were inapplicable; and, under § 15, act of April 8, 1883, P. L. 251, the after-born children were entitled to the same interest in the real estate of testator, "as if he had actually died without any will." *Robeno v. Marlatt*, 35.

3. Such children are not required to look only to the proceeds of the sale made by the widow, as that requirement would deny to them the interest in their father's estate to which they are entitled under the statute. *Ibid.*, 35.

(a) A testator directed that the income of property devised to a trustee for the benefit of his sons, should be paid to them during life "free from their debts," etc., and that the income of a trust devise for his daughter should be paid to her, during life, for her sole and separate use, upon her separate receipt, without the control or interference of any husband:

4. Although the use of the words "free from debts," etc., is perhaps not essential to create a spendthrift trust, their omission, in the case of the daughter, was significant of the testator's intention with respect to her, and the trust for her benefit could not be sustained as a spendthrift trust. *Kuntzman's Estate*, 142.

(a) A testator bequeathed personalty, in trust, to pay the income thereof in equal shares to four persons, "so long as any of said legatees may live, it being my wish and direction that the trust estate shall be kept together as a whole until the death of all the said legatees." Upon the death of any one of them, it was provided:

(b) "Then the part payable to such deceased legatee shall be payable to their heirs, assigns, or legal representatives, as the case may be;" and upon the death of all four, the principal to be divided into four equal parts, "and one fourth to be paid over to the heirs, assigns, or legal representatives, of each of the four legatees:"

5. The word "heirs," when used in a limitation of personal property to the heirs of the first taker, either substitutionally or by way of succession, is generally understood to mean those entitled under the statutes of distribution in case of intestacy, and in this instance, indicated the legatee's next of kin under the intestate laws. *Comly's Estate*, 153.

6. The words "assigns or legal representatives," following the word "heirs," were referable to the latter word "heirs," in the will, so that the income payable to the deceased legatee for and during his life only, should from and after his decease be paid to his heirs and *their* assigns or legal representatives. *Ibid.*, 153.

7. By said will, an active, valid and continuing trust was created for the management of the fund bequeathed, the payment of the income thereof to the four primary beneficiaries during their respective lives, and the preservation of the corpus for distribution on the death of the last survivor. *Ibid.*, 153.

8. Wherefore, a creditor, attaching the interest of one of the primary beneficiaries, by writ served upon the trustee after the death of the debtor, must be confined to the share of the income accruing to the primary beneficiary before the latter's death. *Ibid.*, 153.

9. Under a devise to one for life, with remainder to his children "or their heirs," the devisee having died without ever having had children, the remainder never vested in any one; and hence the reversion, subject to the

life-estate, remained in the estate of the testator and passed under a residuary clause. *High's Estate*, 222.

(a) Subject to certain bequests to his father, sisters and others, a testator bequeathed the whole of his estate in trust for his wife for life, providing that at her death his daughter should enjoy its benefits until she attained the age of twenty-five years, when she should have an absolute right thereto.

(b) He afterwards directed that in case his wife should outlive said daughter, two thirds of the whole estate should be divided equally, at his wife's death, between his father and sisters, and the remaining one third should become the absolute property of his friend, Pedro Salome, or his heirs forever:

10. The interest of the daughter under the will was a vested estate, subject to be divested by her death before her mother: *McCall's App.*, 86 Pa. 254; *Churchman's App.*, 22 W. N. 131; *Montgomery v. Petriken*, 29 Pa. 118; wherefore, the daughter having died in her minority, during her mother's life, the bequest of the one third to Salome took effect. *Batlione's Estate*, 307.

(c) Two thirds of the estate having been diverted by the election of the widow to take against the will, and by the birth of another child not provided for therein, the sum of \$1,633.93, by consent of all parties, was paid to the testator's father and sisters, for a release of their rights, reducing the trust fund thereby to \$697.89:

11. Salome was entitled, in addition to the one third of the trust fund bequeathed to him, to take the other two thirds, under the equitable doctrine that a bequest to a widow will be sequestrated to compensate a legatee disappointed by her election, said two thirds being less than what the widow would have taken under the will, and less than his loss by reason of her election. *Ibid.*, 307.

12. Although a contract and a will are essentially unlike, they may be, and sometimes are combined so as to give a testamentary character to what purports to be a will, or to convert a will into an irrevocable agreement. Whether a given writing is a will or contract, must be determined from the character of its contents, rather than from its title or formal words. *Cawley's Estate*, 628.

13. If two or more persons own property in common, there is no objection, on principle, to their joining in a testamentary disposition of it, and this might be called a joint will. Whether, after the death of one or more of the makers, the surviving maker may revoke such a will, as to his title or share of the property devised, not decided. *Ibid.*, 628.

(a) Brother and sister joined in executing a paper in the following form: "I, B. C., should I be the first to die, and I, M. C., should I be the first to die, give, devise and bequeath, and to the survivor of either of us," all the estate of the decedent, for life, with remainder over. Throughout the paper, except in the clause appointing an executor, the operative words were in the singular number:

14. The instrument was not a contract, in form or effect; nor, there being no joint property or joint devise, was it a joint will. It was properly a double will, and must be construed and treated as the separate will of

each maker, as fully as though a separate copy had been executed by each. Wherefore, after the death of one, it was revocable by the other as to his own property. *Ibid.*, 628.

WITNESS.

(a) In a suit by the administrator of the insured to recover from an assignee of a life insurance policy the money collected thereon by the defendant from the insurance company, the defendant alleged that he received the assignment in consideration, in part, of a debt due to a firm of which he was a member:

1. It being shown that, at the time of receiving the assignment, the debt due to the firm was charged upon the firm books against the defendant and assumed by him, and that his partner would be under no liability to him should a recovery be had in this suit, the partner was a competent witness for the defendant. *Shaak v. Meily*, 161.

2. The lessor of an oil lease being dead, in a controversy between one who had succeeded to his title and an assignee of the lessee, as to whether the leasehold estate had been forfeited, the lessee and his assignee were incompetent, both before and after the passage of the act of May 23, 1887, P. L. 158, to testify to a waiver of forfeiture by the lessor. *Duffield v. Hue*, 602.



